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03-1527

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SUPREME COURT OF WISCONSIN

GARY HANNEMANN,

Plaintiff-Respondent-Petitioner,

v.

CRAIG BOYSON, D.C.

Defendant-Appellant.

Case No.: 03-1527
Outagamie County Circuit Court
Case No.: 00-CV-765

ON APPEAL FROM THE CIRCUIT COURT OF OUTAGAMIE COUNTY
THE HONORABLE HAROLD V. FROEHLICH,
CIRCUIT COURT JUDGE, PRESIDING

BRIEF AND APPENDIX OF PLAINTIFF-RESPONDENT-PETITIONER GARY HANNEMANN

PETERSON, BERK & CROSS, S.C.

200 East College Avenue
P.O. Box 5159
Appleton, WI 54912-5159
(920) 831-0300

John C. Peterson
State Bar No.: 1010965
Jolene D. Schneider
State Bar No.: 1023881

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. DID THE TRIAL COURT ERR IN NOT USING THE PATTERN SPECIAL VERDICT FORM DESIGNED FOR MEDICAL NEGLIGENCE CASES INVOLVING INFORMED CONSENT IN THIS CHIROPRACTIC NEGLIGENCE CASE WHERE THE JURY WAS PROPERLY INSTRUCTED ON THE ELEMENTS OF INFORMED CONSENT APPLICABLE TO THE CHIROPRACTIC STANDARD OF CARE?

ANSWER OF THE COURT OF APPEALS: YES

II. IF THE TRIAL COURT DID ERR IN NOT TRANSFERRING THE MEDICAL SPECIAL VERDICT FORM FOR INFORMED CONSENT IN THIS CHIROPRACTIC NEGLIGENCE CASE, WAS THAT ERROR PREJUDICIAL?

ANSWER OF THE COURT OF APPEALS: YES

STATEMENT OF THE CASE

On Thursday, August 21, 1997, Gary Hannemann had a sore back from driving and saw his chiropractor, Dr. Craig Boyson, for an adjustment at the end of the day. (R. 63, p. 84) Mr. Hannemann routinely drove 800 to 1,200 miles per week, and had been treating with Dr. Boyson for a little more than a year. (R. 63, p. 98) As part of his treatment that day, Dr. Boyson administered a cervical adjustment that involved a rotational component, a twisting of the neck. (R. 63, p. 108-110) Mr. Hannemann immediately felt pain from the adjustment unlike he had experienced in the past (R. 63, 108-110), and the pain was still present after he left the doctor's office and joined friends for drinks after work. (R. 63, p. 207)

On Friday, August 22, Mr. Hannemann returned to work, but over the course of the day he developed unusual symptoms. Although he was not in pain, his leg was "acting up" while he walked and he became sufficiently concerned to call Dr. Boyson's office. (R. 63, p. 117) Dr. Boyson acknowledged that his office relayed to him Mr. Hannemann's report of "strange symptoms that you wouldn't expect," and he arranged for a Saturday office visit during a time the office was actually closed. (R. 62, pp. 136-7) Despite the fact that his billing records indicate that the Saturday office visit was exactly the same as the Thursday visit, Dr. Boyson testified that, to the contrary, he did a very comprehensive examination and an unusual "soft tissue manipulation." (R. 62, p. 145)

In contrast, according to Mr. Hannemann, the adjustment he received on Saturday was exactly the same as the adjustment on Thursday. (R. 63, p. 122) The only thing different about the examination on Saturday was that the doctor added

reflex testing. (R. 63, p. 121) The Doctor admitted that, contrary to his trial testimony, his billing record indicates that he did a normal adjustment at this visit. (R. 63, p. 141)

Surprisingly, there were two different versions of Dr. Boyson's handwritten office record of the Saturday treatment. (R. 62, p. 147) Although the doctor seemed puzzled at the Saturday office visit, Mr. Hannemann denies that he was told to go to the emergency room (R. 63, pp. 122-3) or to see a medical doctor. (R. 63, p. 167) Dr. Boyson says that he told Mr. Hannemann at the Saturday office visit that he should go to the emergency room because he was "quite sure" this was no longer a chiropractic problem. (R. 62, p. 159) The doctor admits, however, that this recommendation did not appear in his first version of the written notes of the visit. (R. 62, 147) It is not until the second version of the office notes that any reference is made to a medical referral, and at trial the doctor testified that he told Mr. Hannemann to go to the doctor "[q]uickly, as soon as possible." (R. 62, pp. 147-8) Mr. Hannemann was at the doctor's that Saturday because of his concern for his symptoms, and he told the jury that if the doctor had said he needed immediate medical treatment he would have done that. (R. 63, p. 185-86)

Mr. Hannemann made it through the balance of Saturday, went to bed, then woke up at about 3:00 a.m., and found that he was essentially paralyzed on one side. (R. 63, p. 124) He was taken by his wife to the emergency room, but was discharged when the staff told him that he was too young for the symptoms to be caused by a stroke. (R. 63, pp. 125-6) He was home for several hours, but when the symptoms did not improve he returned to the hospital. At that point, he was observed by Dr. Philip Yazbak, a neurosurgeon, who recognized the stroke. (R. 63,

p. 127)

Mr. Hannemann's stroke resulted in significant, permanent disability. (R. 63, pp. 135-710; R. 60 - Powley Deposition, pp. 17-8 and 20) The medical expense alone was $19,000.00. (R. 63, p. 140) The nature and extent of the disability was never really in dispute.

Unbeknownst to Mr. Hannemann at the time of the relevant treatment (R. 63, pp. 99-100), there is a well known relationship between cervical, chiropractic adjustments and neurovascular injury, including stroke. (R. 64, p. 202) During trial, there was testimony that the incidence of such injuries could be as high as 55 out of 177, or as low as 1 out of 400,000 (R. 64, p. 112) or even lower. (R. 60, Murkowsi Deposition, p. 54) Dr. Boyson testified that he does not remember being taught about the relationship (R. 62, p. 112), although his own chiropractic expert witness testified that it was well known, discussed in the professional literature, and taught in the chiropractic colleges. (R. 64, p. 96)

There is a test, called the George's Test, which is designed to screen patients before doing a cervical adjustment to find if they are predisposed to neurovascular injury. (R. 64, pp. 107-08) Mr. Hannemann's chiropractic expert witness testified that Dr. Boyson was negligent in failing to administer the George's Test. (R. 60, Murkowski Deposition, pp. 18-20) Dr. Boyson's expert did testify that he did not find the failure to administer the test to fall beneath the standard of care, but then he admitted that he, himself, always does the test before doing a cervical adjustment. (R. 64., pp. 107-8) Dr. Boyson admitted that even as late as his pretrial deposition he was unaware of any such protocols or procedures designed to protect against neurovascular injuries. (R. 62, p. 157)

Chir 11.02(5) of the Wisconsin Administrative Code, as adapted in June, 1997, provides in relevant part, as follows:

> **(5)** Patient records shall include documentation of informed consent of the patient, or the parent or guardian of any patient under the age of 18, for examination, diagnostic testing and treatment.

In addressing the standard of care for informed consent, Dr. Boyson admitted that its purpose was to allow the patient to participate meaningfully in the decision whether to proceed with the treatment. (R. 62, p. 113) There is no question that Mr. Hannemann was never informed by Dr. Boyson that there was any risk of neurovascular injury associated with a cervical adjustment. (R. 63, pp. 99-100; R. 62, p. 129) Finally, Dr. Boyson admitted that, at least at times, he took it upon himself to not alarm patients by disclosure of a rare risk, even if the risk is severe, *because the patient might decide not to proceed with treatment the doctor thinks is beneficial.* (R. 62., 117)

Mr. Hannemann's expert testified that Dr. Boyson failed to meet the standard of care. (R. 60, Murkowski Deposition, p. 12) Dr. Murkowski produced for the jury several standard, chiropractic informed consent forms, including forms produced by Northwestern Chiropractic College, Palmer Chiropractic College and Parker Chiropractic College, all of which disclosed the risk of neurovascular injury including the possibility of stroke and death. (R. 60, Murkowski Deposition, p. 23) In fact, Dr. Murkowski testified that he is unaware of any chiropractic informed consent form that does not include this risk. (R. 60, Murkowski Deposition, pp. 60-61)

Dr. Wilder, Dr. Boyson's chiropractic expert, agreed that the concept of informed consent fell within the scope of the chiropractic standard of care, but he

concluded that Dr. Boyson met that standard, despite not disclosing the risk of neurovascular injury. (R. 64, p 80) On both direct (R.64, pp. 85-88) and cross (R. 64, pp 109-116) examination, Dr. Wilder testified about the evolving requirements of informed consent within the context of the chiropractic standard of care. He admitted that if the jury believed Mr. Hannemann's testimony that Dr. Boyson proceeded with the Saturday adjustment in the face of the neurological symptoms without warning of the risks of neurovascular injury, that would have been a breach of protocol. (R. 64, pp. 115-116) Dr. Wilder then admitted that on his own informed consent forms, he discloses the risk, and that he also was unaware of any chiropractic informed consent form that did not disclose the risk of this type of injury arising from a cervical adjustment. (R. 64, pp. 113-14; 121-124)

Mr. Hannemann was unequivocal in testifying that he was never told by Dr. Boyson that the risk existed. (R. 63, p. 99) He had no knowledge that the risk existed. (R. 63, p. 100) Finally, *if he had known of the risk, he would not have subjected himself to the adjustment*. (R. 63, p. 141)

Mr. Hannemann commenced this action, alleging that Dr. Boyson negligently provided treatment and caused permanent injury. (R. 2) The matter was tried to a 12-person jury February 17-20, 2003. (R. 62-66) During the instruction conference, Dr. Boyson requested that the special verdict include informed consent questions from WIS-JI-CIVIL 1023.1, entitled "PROFESSIONAL NEGLIGENCE: MEDICAL: INFORMED CONSENT: SPECIAL VERDICT." (R. 65) The Circuit Court denied his request and submitted a standard negligence verdict to the jury. (R. 65) However, at Dr. Boyson's request, the Circuit Court agreed to read WIS-JI-CIVIL 1023.2, "PROFESSIONAL NEGLIGENCE: MEDICAL: INFORMED

CONSENT" to the jury, which sets forth the parameters of informed consent for medical doctors in Wisconsin. (R. 65)

The jury found Dr. Boyson causally negligent, and Judgment was entered in Mr. Hannemann's favor. (R. 48,56) After his post-verdict motions were denied, Dr. Boyson appealed. (R. 55) In its decision filed April 13, 2004, the Court of Appeals held that the special verdict was erroneous because it did not contain a distinct question about informed consent. (App.1 p. 10, ¶22) The Court then further found that the error was not "harmless." (App.1 p. 10-11 ¶23-24)

ARGUMENT

The Court of Appeals' decision in this case lies in direct conflict with established Wisconsin law, including a previously published Court of Appeals decision. In formulating the verdict, the Circuit Court examined the relevant facts, including the testimony of practicing chiropractors which indicated that the failure to provide informed consent is a breach of the standard of care, the proper standard of law, including prior published decisions clearly distinguishing the practice of medicine from the practice of chiropractic. In formulating the relevant instructions and verdict, the trial court engaged in a rational decision making process whereby the jury was informed on possible limitations to informed consent and was then given a standard negligence verdict. The Circuit Court submitted the correct form of verdict to the jury, and adequately protected the substantial rights of Dr. Boyson.

A new trial may only be granted "because of errors in the trial, or because the verdict is contrary to law or to the weight of the evidence, or because of excessive or inadequate damages, or because of newly-discovered evidence, or in the interest of justice." Sec. 805.15, Wis. Stats. Even if errors were made in trial, a new trial may not be granted unless the error complained of has affected the substantial rights of the party seeking a new trial. Sec. 805.18, Wis. Stats.

The decision as to whether to grant a new trial rests in the discretion of the Circuit Court. That determination should not be disturbed absent a clear abuse of discretion. See, e.g. Burch v. American Family Mut. Ins. Co. 198 Wis. 2d 465, 543 N.W.2d 277 (1996). The Circuit Court's exercise of discretion should be sustained if the Circuit Court "examined the relevant facts, applied the proper standard of law, and engaged in a rational decision-making process." Schultz v.

Darlington Mut. Ins. Co., 181 Wis. 2d 646, 656, 511 N.W.2d 879, 883, (1994). The Court may not simply substitute its judgment for that of the jury nor order a new trial on the basis that another jury might reach another result. Burch, 198 Wis. 2d at 477, 543 N.W.2d at 282. Thus, the inquiry for this Court focuses on whether the Circuit Court made a reasoned determination, not whether this Court would have made the same determination. Schultz, 181 Wis. 2d 656-57, 511 N.W.2d at 883.

I. THE TRIAL COURT DID NOT ERR IN FULLY INSTRUCTING THE JURY ON THE ELEMENTS OF CHIROPRACTIC INFORMED CONSENT, BUT NOT EMPLOYING THE SPECIAL VERDICT FORM APPLICABLE TO MEDICAL NEGLIGENCE.

In this case, the Circuit Court examined the relevant facts, including the testimony of practicing chiropractors which indicated that the failure to provide informed consent is a breach of the standard of care, the proper standard of law. The trial court considered prior published decisions clearly distinguishing the practice of medicine from the practice of chiropractic, and engaged in a rational decision making process whereby the jury was informed on possible limitations to informed consent and was then given a standard negligence verdict.

The Circuit Court is vested with wide discretion in framing the special verdict. Although they may be helpful, the pattern jury instructions and verdict forms contained in WIS-JI-CIVIL are not precedential authority. Runjo v. St. Paul Fire & Marine Ins. Co., 197 Wis. 2d 594, 602, 604, 541 N.W.2d 173, 177 (Ct. App. 1995). In this case, the Circuit Court submitted the correct form of verdict to the jury. A general negligence verdict was proper because the evidence presented at trial, by both parties, was clear that a chiropractor's failure to obtain the informed consent of his patient constitutes negligence. WIS-JI-CIVIL 1023.1,

Dr. Boyson's proposed special verdict form regarding informed consent, simply does not apply to the failure of a chiropractor to obtain the informed consent of his patient. The form of special verdict instruction 1023.1 was formulated to apply the law of informed consent as it applies to medical physicians, not chiropractors. Submission of the verdict applicable to medical doctors would have only confused and misled the jury.

The Wisconsin Legislature and appellate courts have deliberately distinguished the practice of medicine from the practice of chiropractic. Our legislature recognizes "the practice of chiropractic as a separate and distinct health care discipline." Kerkman v. Hintz, 142 Wis.2d, 404, 415, 418 N.W.2d 795, 800 (1988). To that end, chiropractors are held to a chiropractic, not a medical, standard of care. Id. at 417, 418 N.W.2d at 801. Under the chiropractic standard of care, chiropractors "must exercise that degree of care, diligence, judgment, and skill which is exercised by a reasonable chiropractor under like or similar circumstances." Id. at 419-20, 801-02.

Similarly, the requirements for chiropractic licensure are distinct from the requirements for medical licensure. See generally Chapters 446 and 448, Wis. Stats. Chiropractors must be licensed by the Chiropractic Examining Board whereas physicians are licensed by the Medical Examining Board. Chapter 446, entitled "Chiropractic Examining Board," governs licensure of Wisconsin chiropractors and Chapter 448, entitled "Medical Practices," governs the licensure and practice of physicians in the State of Wisconsin.

As part of the governance of chiropractors, Sec. 446.02, Wis. Stats., authorizes the Chiropractic Examining Board to create rules regarding the creation

and maintenance of chiropractic patient records. In June, 1997, the Chiropractic Examining Board created Wis. Admin. Code, Sec. Chir. 11.02(5), which requires chiropractors to have documentation of informed consent in a patient file. It simply provides that "patient records shall include documentation of informed consent...for examination, diagnostic testing and treatment." Prior to this enactment, there was no legislative or administrative requirement that a chiropractor obtain his patient's informed consent prior to rendering treatment.

In contrast, Subchapter II of Chapter 448, entitled "Medical Examining Board," addresses licensure of physicians. As part of this subchapter, Sec. 448.30, Wis. Stats., provides that a physician must obtain informed consent prior to providing medical treatment to a patient. It provides that a "*physician* who treats a patient shall inform the patient about the availability of all alternate, viable *medical* modes of treatment and about the risks and benefits of those treatments," and details the parameters of that obligation. A "physician" is "an individual possessing the degree of doctor of medicine or doctor of osteopathy or an equivalent degree as determined by the medical examining board, and holding a license granted by the medical examining board." A chiropractor is not a medical physician. Therefore, the statutory delineation of "informed consent" found in 448.30 is unique to medical physicians.

It is significant that there is no language as to the scope of the informed consent contained in any statute or regulation that governs the practice of chiropractic comparable to that contained in Sec. 448.30. Therefore, the statute, which on its face regulates only physicians, has no relevance to a claim of chiropractic negligence; prior to the adaption of Wis. Admin. Code, Sec. Chir.

11.02(5), there is no question that the doctrine of informed consent was inapplicable to chiropractic altogether in Wisconsin. Murphy v. Nordhagen, 222 Wis. 2d 574, 584, 588 N.W.2d 96, 101 (Ct. App.1998), review denied, 590 N.W.2d 490 (1999). The Court of Appeals correctly noted that patients have the right to refuse unwanted treatment. P-App. 9, ¶20, citing In re Guardianship of L.W., 167 Wis. 2d 53, 482 N.W.2d 60 (1992). However, absent specific statutory or regulatory directives to the contrary, the *scope* of the informed consent requirement in the practice of chiropractic is defined by the chiropractic standard of care.

The medical malpractice verdict form proposed in WIS JI-CIVIL 1023.1, arose from the law governing medical physicians as articulated in Sec. 448.30, Wis. Stats., and in case law both under that statute and Chapter 655. As explained above, Chapter 448 regulates the licensure of medical doctors. Chapter 655, entitled "Health Care Liability and Patients Compensation," governs medical negligence actions. A chiropractic negligence action may not be brought under Chapter 655; chiropractors are not statutory, "health care providers." *See* Secs. 655.001(8) and 655.002, Wis. Stats. Chapters 448 and Chapter 655 do not regulate the practice of chiropractic or chiropractic negligence actions, which renders the verdict form of 1023.1 inapplicable to a chiropractic negligence case.

The Court of Appeals clearly confirmed this legal distinction in Murphy v. Nordhagen, 222 Wis.2d 574, 588 N.W.2d 96 (Ct. App.1998), review denied 590 N.W.2d 490 (1999). There, the Court rejected a negligence claim brought by a patient against her chiropractor. The patient alleged that her chiropractor had failed to obtain her informed consent prior to treatment, basing her claim on Sec. 448.30. Id. at 574, 588 N.W.2d at 101. The Court concluded that the chiropractor had *no*

duty under that statute, as it and the cases interpreting it are "facially inapplicable to a chiropractic negligence case." Id. Nonetheless, the Court of Appeals in the present case cited Fischer v. Wisconsin Patients Comp. Fund, 2002 WI App 192, 256 Wis. 2d 848, 650 NW.2d 75, a case involving a medical malpractice claim against a surgeon, for the proposition that the standards set forth in Sec. 448.30, Wis. Stats., apply to chiropractors.

Wis. Admin. Code, Sec. Chir. 11.02(5) provides that

> Patient records shall include documentation of informed consent of the patient, or the parent or guardian of any patient under the age of 18, for examination, diagnostic testing and treatment.

This regulation has been in place since 1997. Prior to that time, there was no written rule requiring chiropractors to obtain informed consent from their patients. The Chiropractic Examining Board could have elected to use language similar to that of Sec. 448.30 in crafting this regulation, but did not. Since that time, neither the Chiropractic Examining Board nor the Wisconsin Legislature has elected to modify, expand or restrict that obligation. As a result, there is no statutory or administrative language defining "informed consent" in the chiropractic profession as there is in the practice of medicine. The standards by which an individual chiropractor is expected to abide are thus left to those of reasonable chiropractors under like or similar circumstances, the standard of care for chiropractic expressed by the Court in Kerkman v. Hintz, 142 Wis. 2d 404, 418 N.W.2d 795 (1988). A breach of that standard constitutes negligence.

As described above, both chiropractic expert witnesses gave extensive testimony regarding the standard of chiropractic care relating to the issue of informed consent. The Circuit Court properly submitted a general negligence

verdict to the jury, because "in cases founded upon negligence, the court need not submit separately any particular respect in which the party was allegedly negligent." Sec. 805.12, Wis. Stats. In the practice of chiropractic, unlike the practice of medicine, negligence in failing to obtain informed consent is legally indistinct from negligence in the provision of diagnosis and treatment of a patient.

In rendering its decision, the Court of Appeals arbitrarily placed limitations on the chiropractor's duty to obtain the informed consent of his patient which are inconsistent with Wisconsin Law. If the scope of the duty to obtain informed consent is to be the subject of a separate cause of action, it must be crafted by the Chiropractic Examining Board or the Wisconsin Legislature.

In this case, the evidence was clear that Dr. Boyson's failure to inform Gary Hannemann of the risk of neurovascular injury following cervical adjustment breached the chiropractic standard of care. During trial, Mr. Hannemann's liability expert, Dr. Murkowski, testified that reasonable chiropractors would advise of the risk of neurovascular injury from chiropractic cervical manipulations. Even Dr. Wilder, Dr. Boyson's own liability expert, testified that he warns his own patients of the risk of neurovascular injury following cervical adjustment. Furthermore, Dr. Boyson himself did not dispute the fact that he failed to inform Mr. Hannemann of the risk of neurovascular injury. Under these circumstances, there is substantial evidence supporting the jury's finding that Dr. Boyson failed to meet the standard of care required of those practicing in his profession.

Use of the form verdict contained in WIS-JI-CIVIL 1023.1 most certainly would have confused and misled the jury given the nature of the testimony at trial. The form verdict contains incorrect information about the obligation of a

chiropractor to obtain informed consent. The Circuit Court properly submitted a negligence verdict to the jury, as the evidence demonstrated that Dr. Boyson was negligent in several respects. For example, during trial, Mr. Hannemann introduced evidence that showed Dr. Boyson was negligent in performing chiropractic adjustments on August 21, 1997 and on August 23, 1997. Had the Court submitted informed consent questions, which address a specific type of negligence, in addition to general negligence questions, confusion would have ensued. Submission of 1023.1 to the jury would have been particularly confusing in the context of comparative negligence and cause.

The special verdict given to the jury addressed the material issues of ultimate fact: *negligence, cause and damages* . Because the failure to obtain informed consent constitutes negligence, the verdict used should have been easily understood by the jury. There is no question that the verdict is entirely consistent with the evidence.

II. EVEN IF THE COURT DETERMINES THAT A SPECIAL VERDICT FORM FOR CHIROPRACTIC INFORMED CONSENT ANALOGOUS TO THAT USED FOR MEDICAL INFORMED CONSENT SHOULD BE THE PREFERRED PRACTICE, ANY ERROR IN THE FORM OF VERDICT USED IN THIS CASE WAS HARMLESS.

Even if the same limitations on informed consent applied to chiropractors and physicians, the Circuit Court's failure to submit WIS-JI-CIVIL 1023.1 to the jury would be harmless error. An error is harmless when it does not affect the substantial rights of a party. Sec. 805.18, Wis. Stats. Here, the jury was instructed on the elements of a medical physician's obligation to obtain informed consent, at Dr. Boyson's request, when the Circuit Court read WIS-JI-CIVIL 1023.2 to the jury. 1023.2 is derived from Sec. 448.30, Wis. Stats., the standard which the

Court of Appeals erroneously applied in this case.

The evidence in this case was clear. There is no dispute that Mr. Hannemann was not told of the risk of neurovascular injury arising from a cervical, chiropractic adjustment. He unambiguously testified that if he had known of the risk, he would not have undergone the adjustment. (R. 63, p.141) Finally, although the evidence was in dispute regarding cause, it can not be argued that the jury's verdict was not supported by the evidence. They were fully instructed on the law regarding informed consent and cause, and their verdict is entirely consistent with the evidence with which they were presented over the course of the trial.

In finding that there was error in the verdict form and that it was not harmless, the Court of Appeals relied on Fischer v. Wisconsin Patients Compensation Fund, 256 Wis.2d 848, 853, 650 N.W.2d 75 (2002) (Note the Court of Appeal decision contains a typographical error in the citation designating the plaintiff as Flesher, rather than Fischer) for the proposition that "[a] special verdict must cover material issues of ultimate fact." Actually, the language used contains only a part of the quotation the Court of Appeals adapted in Fischer from Meurer v. ITT Ge. Controls, 90 Wis.2d 438, 445-46, 280 N.W.2d 156 (1979). The full quotation reads as follows:

> A special verdict must cover material issues of ultimate fact.... The form of a special verdict is discretionary with the trial court and this court will not interfere as long as all the material issues of fact are covered by appropriate questions.

The issue in Fischer was whether the trial court erred in a medical negligence, informed consent case by including a cause question in its informed consent verdict. Other than the partial quotation, it has marginal relevance to the issues here.

Through the instruction, the jury was told of exceptions to and limitations upon a chiropractor's duty to obtain informed consent based upon the medical standards incorporated in 1023.2 and Sec. 448.30 that were arguably supported by the evidence. If jurors concluded that an exception or limitation applied, they knew that Dr. Boyson was not negligent on that basis. As a result, the Circuit Court adequately protected the substantial rights of Dr. Boyson and properly denied the Motion for a New Trial.

CONCLUSION

The Court of Appeals' decision in this case lies in direct conflict with established Wisconsin law. The Circuit Court submitted the correct form of verdict to the jury after consideration of the relevant facts and applicable law, and the jury was even instructed as to the parameters of the doctrine of informed consent as applied to medical doctors. Even if a separate special verdict on the issue of informed consent were believed to be the preferred practice, there is no prejudice shown on the facts before this Court, and any error below was harmless. Therefore, Mr. Hannemann respectfully believes that the Court of Appeals misapplied the law and its decision should be reversed.

Respectfully submitted this 18th day of October, 2004.

PETERSON, BERK & CROSS, S.C.

By: John C. Peterson
State Bar No.: 1010965
Jolene D. Schneider
State Bar No.: 1023881
Attorneys for Plaintiff-Respondent,
Gary Hannemann

200 East College Avenue
P.O. Box 5159
Appleton, WI 54912-5159
(920) 831-0300

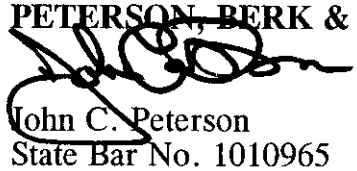
CERTIFICATION

I certify that this brief conforms to the rules contained in Sec. 809.19(8)(b) and (c), Wis. Stats., for a brief produced using the following font:

Proportional serif font: Minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points, maximum of 60 character per full line of body text. The length of this brief is 4,403 words.

Dated this 18th day of October, 2004

PETERSON, BERK & CROSS, S.C.

By: 

John C. Peterson
State Bar No. 1010965
Attorneys for Plaintiff-Respondent

200 East College Avenue
P.O. Box 5159
Appleton, WI 54912-5159
(920) 831-0300

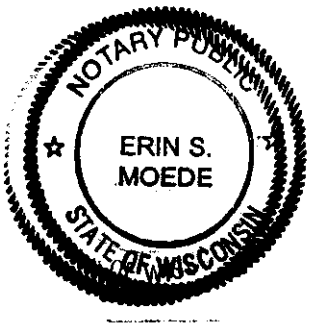
CERTIFICATION OF MAILING

I, Julie Kaepernick, being first duly sworn on oath, state that I am an employee of Peterson, Berk & Cross, S.C., and not a party of this action; that on the 18th day of October, 2004, in the State of Wisconsin, County of Outagamie, I sent via Federal Express, Brief and Appendix of Plaintiff-Respondent-Petitioner Gary Hannemann to the Clerk of Court of The Supreme Court of Wisconsin, 110 East Main Street, Suite 215, Madison, Wisconsin 53703.

Julie Kaepernick

Subscribed and sworn to before me
this 18th day of October, 2004.

Notary Public, Outagamie County
My commission is/expires 9/2/07



APPENDIX

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COURT OF APPEALS
DECISION
DATED AND FILED

April 13, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-1527 Cir. Ct. No. 00CV000765

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

GARY HANNEMANN,

PLAINTIFF-RESPONDENT,

V.

CRAIG BOYSON, D.C.,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Outagamie County: HAROLD V. FROEHLICH, Judge. *Affirmed in part; reversed in part, and cause remanded with directions.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PETERSON, J. Craig Boyson, a chiropractor, appeals a judgment finding him negligent in his care and treatment of Gary Hannemann. Hannemann suffered a stroke after Boyson gave him a cervical adjustment. Boyson argues the court erred by (1) eliminating the final paragraph from the standard informed

consent jury instruction, and (2) giving a standard causation instruction rather than one that would allow the jury to find partial causation from another source. We disagree and affirm on these issues. Boyson further argues the special verdict was erroneous because it only asked whether Boyson was negligent in his treatment. Boyson argues failure to obtain informed consent and negligent treatment are two different issues that require different verdict questions. We agree with Boyson on this issue and reverse that part of the judgment and remand for a new trial.

BACKGROUND

¶2 Boyson saw Hannemann approximately forty times between July 22, 1996, and August 23, 1997, for neck and back treatments. Boyson explained the treatments he would perform, including risks and benefits. Boyson admits, however, that he did not discuss the risk of neurovascular injury because he thought the risk was "astronomical" and based on "controversial" research.

¶3 Hannemann claims Boyson injured him on August 21, 1997, while performing a cervical adjustment. Hannemann described the adjustment as involving Boyson placing his hands on either side of Hannemann's head and rotating or twisting the head until there was a crack. Hannemann claimed he experienced pain at the time of the adjustment, but by the time he left Boyson's office he no longer felt any pain. At trial, Boyson disputed Hannemann's description of the adjustment. He denied forcefully twisting or rotating Hannemann's head.

¶4 The next morning, Hannemann went to work. In the afternoon, he noticed his left leg "acting up." He called Boyson's office and scheduled an appointment for the next day, August 23. Hannemann stated that when he went in, Boyson performed reflex testing and did another cervical adjustment. Boyson

denied performing a second adjustment during this visit. He recalled only gently stretching the muscles in Hannemann's neck and advising him to go to the emergency room for an evaluation. Hannemann denies he was told to go to the emergency room, stating that he would have gone if Boyson had advised him to do so. Hannemann stated he continued to feel tingling in his leg after he left Boyson's office and his leg felt "different."

¶5 At approximately three the next morning, August 24, Hannemann awoke. He felt paralyzed on his left side. His wife took him to the emergency room. Initially, Hannemann was discharged. However, Hannemann and his wife returned to the hospital several hours later when Hannemann's condition did not improve. A neurosurgeon then determined his paralysis was caused by a stroke.

¶6 Hannemann commenced an action against Boyson, alleging Boyson negligently provided chiropractic treatment and caused permanent injury. A jury trial took place February 17-20, 2003. Hannemann argued Boyson was negligent in two respects. First, Boyson deviated from the standard of care in performing adjustments on August 21 and August 23. Second, Boyson failed to inform Hannemann of the risk of neurological injuries following cervical adjustments.

¶7 Several expert witnesses, as well as Hannemann's treating physicians, testified that the cervical adjustments caused the stroke. Defense experts disagreed. One testified Hanneman's earlier bout with meningitis was the cause.

¶8 At the jury instruction conference, Boyson asked that the court give WIS JI—CIVIL 1023.2, regarding informed consent. The court did so but deleted the last paragraph, which defines limits and exceptions to the duty to disclose.

¶9 Boyson also requested that the special verdict include the informed consent questions from WIS JI—CIVIL 1023.1. The court rejected this request and submitted a special verdict with only a single general question on negligence.

¶10 Boyson also requested WIS JI—CIVIL 1023.8, which would have instructed the jury to separate injuries caused by chiropractic care and those caused by meningitis. The court rejected this request and instead gave the standard cause instruction from WIS JI—CIVIL 1500.

¶11 The jury returned a verdict in favor of Hannemann, finding Boyson causally negligent. It awarded Hannemann $227,000.

DISCUSSION

¶12 "The trial court has broad discretion when instructing a jury." ***Fischer v. Ganju***, 168 Wis. 2d 834, 849, 485 N.W.2d 10 (1992). "If an appellate court can determine that the overall meaning communicated by the instruction as a whole was a correct statement of the law, and the instruction comported with the facts of the case at hand, no ground[] for reversal exists." ***White v. Leeder***, 149 Wis. 2d 948, 954-55, 440 N.W.2d 557 (1989). Moreover, "[e]ven if we find an instruction to be erroneous in part or in whole, a new trial is not warranted unless we also find that the error is prejudicial." ***Muskevitsch-Otto v. Otto***, 2001 WI App 242, ¶6, 248 Wis. 2d 1, 635 N.W.2d 611. Accordingly, "an erroneous jury instruction is not fatal unless we are satisfied that it is probable—not merely possible—that the error affected the jury's determination." ***Id.***

A. WIS JI—CIVIL 1023.2

¶13 The court instructed the jury with the first three paragraphs of WIS JI—CIVIL 1023.2,[1] regarding Boyson's obligation to obtain informed consent. However, the pattern instruction also contains a fourth paragraph, which states:

> If (doctor) offers to you an explanation as to why (he) did not provide information to (plaintiff), and if this explanation satisfies you that a reasonable person in (plaintiff's) position would not have wanted to know that information, then (doctor) was not negligent.

Boyson argues it was error for the court to omit this paragraph. He maintains he explained to the jury why he did not inform Hannemann about the risk of stroke—Boyson believed the risk was "astronomical" and the studies regarding the risk were "controversial." Thus, Boyson argues the jury should have been instructed

---

[1] The court instructed as follows:

> A chiropractor has the duty to provide his patient with information necessary to enable the patient to make an informed decision about a procedure and alternative choices of treatments. If the doctor fails to perform this duty, he is negligent.
>
> To meet this duty to inform his patient, the chiropractor must provide his patient with the information a reasonable person in the patient's position would regard as significant when deciding to accept or reject the medical treatment. In answering this question, you should determine what a reasonable person in the patient's position would want to know in consenting to or rejecting a medical treatment.
>
> However, the chiropractor's duty to inform does not require disclosure of:
>
> Information beyond what a reasonably, well-qualified chiropractor in a similar classification would know;
>
> Extremely remote possibilities that might falsely or detrimentally alarm the patient[.]

that if Boyson's explanation was reasonable, it could find he was not negligent by failing to inform Hannemann of the risk.

¶14 However, Boyson's explanation was covered by the first three paragraphs. These paragraphs stated that a chiropractor must provide information that a reasonable person in the patient's position would want to know. They also stated that a chiropractor is not required to disclose extremely remote possibilities. This was sufficient to cover Boyson's explanation that the risk was "astronomical" and the studies "controversial." Consequently, in this case, the fourth paragraph of the instruction would have merely repeated what the jury was already told within the first three paragraphs. It was not an erroneous exercise of discretion to omit the fourth paragraph from the instruction.

B. WIS JI—CIVIL 1023.8

¶15 Boyson next argues the court erred by not giving the jury the portion of WIS JI—CIVIL 1023.8 regarding causation but instead WIS JI—CIVIL 1500,[2] the standard cause instruction. Boyson notes that one expert witness testified that Hannemann's meningitis caused the injuries. Consequently, Boyson argues the jury should have been instructed with WIS JI—CIVIL 1023.8 that it could separate

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[2] The court did read to the jury the portion of WIS JI—CIVIL 1023.8 regarding negligence, but replaced the section on cause with WIS JI—CIVIL 1500:

> Questions in the special verdict asks about the cause of the injury. These questions do not ask about "*the* cause" but rather "*a* cause" because an injury may have more than one cause. An injury may be caused by one person's negligence or by the combined negligence of two or more people.
>
> You must decide whether someone's negligence caused the injury. Someone's negligence caused the injury if it was a substantial factor in producing the injury.

the portion of the injury caused by meningitis from the portion caused by the adjustment.[3]

¶16 However, Boyson's expert witness testified that meningitis was the sole cause of Hannemann's injuries. He did not say that the meningitis and the adjustment were each causes. There was no evidence from which the jury could determine that the meningitis and the adjustment each partially caused the injuries. Consequently, WIS JI—CIVIL 1023.8 would have confused the jury as to the meaning of cause given the evidence presented in this case. Thus, WIS JI—CIVIL 1500 was proper.

C. WIS JI—CIVIL 1023.1

¶17 Boyson argues the court erred by submitting a single verdict question about negligent treatment. Boyson contends the jury should also have been given verdict questions regarding failure to obtain informed consent. He argues negligence in treatment and negligence for failure to obtain informed consent are separate and distinct concepts. *See* ***Johnson v. Kokemoor***, 199 Wis. 2d 615, 629 n.16, 545 N.W.2d 495 (1996).

¶18 Hannemann responds that WIS JI—CIVIL 1023.1, which contains the separate informed consent verdict, is to be used only in medical informed consent

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[3] In relevant part, WIS JI—CIVIL 1023.8 states:

> It will, therefore, be necessary for you to distinguish and separate, first, the natural results in damages that flow from (plaintiff)'s original (illness) (injuries) and, second, those that flow from (chiropractor)'s treatment and allow (plaintiff) only the damages that naturally resulted from the treatment by (chiropractor).

cases, not in chiropractic informed consent cases. Hannemann contends the informed consent verdict form is based on WIS. STAT. § 448.30,[4] which regulates the licensure of medical doctors. Since § 448.30 does not regulate chiropractors, he concludes the verdict form derived from the statute does not apply to chiropractors. Hannemann cites ***Murphy v. Nordhagen***, 222 Wis. 2d 574, 588 N.W.2d 96 (Ct. App. 1998), for the proposition that a chiropractor has no duty under § 448.30 to obtain informed consent prior to treatment. In ***Murphy***, we determined that § 448.30 applied only to physicians and so was "facially inapplicable" to chiropractic cases. ***Id.*** at 584. Thus, Hannemann concludes that a separate informed consent verdict was not necessary and the trial court correctly instructed the jury.

¶19 At the time we decided ***Murphy***, chiropractors were not required to obtain informed consent. Since then, the law has changed to require chiropractors to obtain informed consent prior to treatment. The Chiropractic Examining Board created WIS. ADMIN. CODE § Chir. 11.02(5),[5] which states: "Patient records shall include documentation of informed consent of the patient, or the parent or guardian of any patient under the age of 18, for examination, diagnostic testing and treatment."

¶20 Granted, WIS JI—CIVIL 1023.1 is based on WIS. STAT. § 448.30, which applies specifically to medical informed consent. However, the legal theories of informed consent for medical doctors and for chiropractors are the

[4] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

[5] WISCONSIN STAT. § 446.02 authorizes the Chiropractic Examining Board to create rules regulating the creation and maintenance of patient records.

same. Further, the principles behind the theories are identical. It has long been recognized that individuals have the right to self-determination, including the right to refuse treatment in whole or in part. *See* ***In re Guardianship of L.W.***, 167 Wis. 2d 53, 68, 482 N.W.2d 60 (1992). The United States Supreme Court has stated, "No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." ***Id.*** (quoting ***Union Pacific Ry. Co. v. Botsford***, 141 U.S. 250, 251 (1891)).

¶21 This principle of self-determination has been extended to the doctrine of informed consent: "Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent, commits an assault, for which he is liable in damages." ***Id.*** (quoting ***Scholendorff v. Society of New York Hosp.***, 105 N.E. 92-93 (1914)). Our supreme court has recognized that the right to liberty under the state constitution "includes an individual's choice of whether or not to accept medical treatment." ***L.W.***, 167 Wis. 2d at 69. These principles underlying the doctrine of medical informed consent apply with equal force to the doctrine of chiropractic informed consent. As our supreme court has observed, both medical doctors and chiropractors are "health care providers." ***Arenz v. Bronston***, 224 Wis. 2d 507, 515-16, 592 N.W.2d 295 (1999). Both are involved in the diagnosis, treatment or care of patients and both are licensed by state

examining boards. *Id.* For these reasons, we conclude that WIS JI—CIVIL 1023.1 is a model for chiropractic negligence as well as medical informed consent.[6]

¶22 A special verdict must cover material issues of ultimate fact. ***Flescher v. Wisconsin Patients Comp. Fund***, 256 Wis. 2d 848, 853, 650 N.W.2d 75 (2002). If it does not, it is defective. WIS. STAT. § 805.12(1). In order to succeed on a claim for failure to obtain informed consent, Hannemann must prove (1) that he was not informed of the risks, (2) that he would not have undergone the treatment had he known of the risks, and (3) the procedure caused the injury. *See id.* at 854. Here, the jury was not asked to determine whether all the elements were present. Instead, the jury only had to answer whether "Dr Craig Boyson [was] negligent with respect to his care and treatment of Gary Hannemann in August of 1997." The jury answered "yes." Thus, the verdict questions did not cover the material issues of ultimate fact necessary to prove Boyson failed to obtain Hannemann's informed consent. *See id.* at 853.

¶23 Hannemann argues that even if failure to submit informed consent verdict questions was error, it was harmless. We disagree. The standard for harmless error is the same for civil, as well as criminal, cases. ***Town of Geneva v. Tills***, 129 Wis. 2d 167, 184-85, 384 N.W.2d 701 (1986). The test is whether there is a reasonable possibility that the error contributed to the outcome of the action or proceeding at issue. ***State v. Dyess***, 124 Wis. 2d 525, 543, 370 N.W.2d 222

[6] Needless to say, the instruction must be modified in chiropractic cases to refer to chiropractors, not to medical doctors. For example, a chiropractor has a duty to inform about alternative, viable chiropractic modes of treatment, not medical modes. Further, a chiropractor need not inform a patient about information beyond what a reasonably well-informed chiropractor would know, not what a physician would know.

(1985). A reasonable possibility of a different outcome is a possibility sufficient to "undermine confidence in the outcome." *Id.* at 545.

¶24 Here, our confidence in the verdict is undermined because we do not know whether the jury would have found that all three elements were present. Indeed, we do not know whether the jury found Boyson guilty of negligent treatment or failure to obtain informed consent. Thus, we conclude it is reasonably possible the error affected the jury's determination. *See id.* The error was not harmless. Consequently, we reverse that part of the judgment and remand the matter for a new trial.

By the Court.—Judgment affirmed in part; reversed in part, and cause remanded with directions. No costs awarded.

Recommended for publication in the official report.

P

STATE OF WISCONSIN CIRCUIT COURT BRANCH IV OUTAGAMIE COUNTY

GARY HANNEMANN,

Plaintiff,

-v-

CRAIG BOYSON, D.C.,

Defendant.

CLERK OF CIRCUIT COURT
OUTAGAMIE COUNTY
FILED
MAY - 2 2003
AT _____ O'CLOCK _____
RUTH H. JANSSEN

Case No.: 00-CV-765

ORDER

The defendant's Motion For a New Trial was before the Court on April 4, 2003, the plaintiff represented by Jolene D. Schneider and the defendant represented by Patrick F. Koenen; and after hearing and consideration of the motion it is hereby

ORDERED

as follows:

1) The defendant's motion is denied.

Dated this 30 day of April, 2003.

BY THE COURT:

Harold V. Froehlich

Honorable Harold V. Froehlich

STATE OF WISCONSIN CIRCUIT COURT BRANCH IV OUTAGAMIE COUNTY

GARY HANNEMANN,

Plaintiff,

-v-

CRAIG BOYSON, D.C.,

Defendant.

CLERK OF CIRCUIT COURT
OUTAGAMIE COUNTY
FILED
MAY - 2 2003
AT ____ O'CLOCK
RUTH H. JANSSEN

Case No. 00-CV-765

JUDGMENT

Based on the jury verdict dated February 20, 2003 and the Court's Order for Judgment dated April 30th, 2003,

IT IS ADJUDGED THAT plaintiff, Gary Hannemann, shall recover from, and have judgment against defendant, Craig Boyson, D.C., the following:

1. The verdict sum of $227,000.00 and
2. Taxable costs in the amount of $4,378.16, plus statutory interest from the date of the verdict.

For a total judgment of $231,378.16, plus statutory interest from the date of the verdict.

Dated this 30th day of April, 2003.

BY THE CLERK:

Outagamie County, Wisconsin

STATE OF WISCONSIN CIRCUIT COURT BRANCH IV OUTAGAMIE COUNTY

GARY HANNEMANN,

Plaintiff,

VS

CRAIG BOYSON, D.C.,

Defendant.

OUTAGAMIE COUNTY
FILED
FEB 20 2003
AT _____ O'CLOCK _____
RUTH H JANSSEN

VERDICT
CASE #00 CV 765

We the jury, impaneled and sworn to try the issues in this action, answer as follows:

QUESTION 1: Was Dr. Craig Boyson negligent with respect to his care and treatment of Gary Hannemann in August of 1997?

ANSWER: Yes
(Yes or No)

QUESTION 2: If you answered question 1 above "yes," please answer the following question. Was the negligence of Dr. Craig Boyson a cause of Gary Hannemann's neurovascular injury?

ANSWER: Yes 10 out of 12
(Yes or No)

QUESTION 3: Was Gary Hannemann negligent with respect to his own care by failing to follow the instructions of his treating physicians?

ANSWER: yes 10 out of 12
(Yes or No)

QUESTION 4: If you answered question 3 above "yes," please answer the following question. Was the negligence of Gary Hannemann a cause of his neurovascular injury?

ANSWER: No 10 out of 10
(Yes or No)

QUESTION 5: If you have answered questions 2 & 4 above "yes," then answer this question. Assuming the total amount of negligence causing Gary Hannemann's neurovascular injury is 100%, how much negligence is attributable to:

1. Dr. Craig Boyson: _____ %
2. Gary Hannemann: _____ %

TOTAL 100%

QUESTION 6: What sum of money will fairly and reasonably compensate Gary Hannemann for the neurovascular injuries he sustained as a result of the chiropractic care provided by Dr. Craig Boyson with respect to:

1. Past Wage Loss: $ 13,500
2. Future Loss of Earnings: $ 13,500
3. Pain, Suffering and Disability: $ 200,000

Dated this 20 day of February, 2003.

Toni M Grosskopf
Foreperson

Dissenting juror Nancy Alfred
as to Question (s) 2 & 4

Dissenting juror Sharon Lupiper
as to Question (s) 2

Jean Bernei
#3

Cathy Watson
#3

1023.1 PROFESSIONAL NEGLIGENCE: MEDICAL: INFORMED CONSENT: SPECIAL VERDICT

Questions 1, 2, and 3 of the special verdict form relate to the issue of informed consent and read as follows:

QUESTION 1: Did (doctor) fail to disclose information about the (insert treatment or procedure) necessary for (patient) to make an informed decision?

Answer: _____
Yes or No

QUESTION 2: If you answered question 1 "yes," then answer this question: If a reasonable person, placed in (patient)'s position, had been provided necessary information about the (insert treatment or procedure), would that person have (refused) (accepted) the (insert treatment or procedure)?

Answer: _____
Yes or No

QUESTION 3: If you have answered both questions 1 and 2 "yes," then answer this question: Was the failure by (doctor) to disclose necessary information about (insert treatment or procedure) a cause of injury to (patient)?

Answer: _____
Yes or No

COMMENT

This special verdict was approved in 2000. This instruction previously was entitled "Malpractice: Patient Compensation Panel Findings." That instruction was withdrawn by the Committee when submission of a medical malpractice controversy to the panel was no longer necessary in 1986 as a prerequisite to filing a claim in circuit court.

The framework for this special verdict is based on the decision in Martin v. Richards, 192 Wis.2d 156, 531 N.W.2d 70 (1995). The plaintiff is required to establish that (1) the patient was not told of risks and alternatives; (2) the patient would have chosen an alternative if he or she had been adequately informed; and (3) the failure to disclose information was a cause of the patient's injuries. If there is a question of comparative negligence, use the format of Wis JI-Civil 3290.

Damages. For instructions on damages based on informed consent, see Wis JI-Civil 1741, Personal Injuries: Medical Care: Lack of Informed Consent, and Wis JI-Civil 1742, Personal Injuries: Medical Care: Offsetting Benefit from Operation Against Damages from Lack of Informed Consent.

LAW NOTE

REVISED MEDICAL INFORMED CONSENT INSTRUCTIONS WIS JI-CIVIL 1023.1, 1023.2, 1023.3, and 1023.4

In 2000, the Committee revised the entire informed consent series to reflect recent appellate decisions. These cases include: Martin v. Richards, 192 Wis.2d 156, 631 N.W.2d 70 (1995); Johnson v. Kokemoor, 199 Wis.2d 615, 545 N.W.2d 495 (1996); Schreiber v. Physicians Ins. Co. of Wisconsin, 223 Wis.2d 417, 588 N.W.2d 26 (1999); and Brown v. Dibbell, 227 Wis.2d 28, 595 N.W.2d 358 (1999).

Present Instructions: In 2000, the most recent published set of Wis JI-Civil contained the following four instructions which were withdrawn and recreated by the Committee:

- **Wis JI-Civil 1023.1 Malpractice: Patient Compensation Panel Findings (© 1989):** This instruction explains the evidentiary impact of the findings of the Patient Compensation Panel. This panel has long been abolished and the Committee concluded no pending actions would likely involve panel findings.

- **Wis JI-Civil 1023.2 Malpractice: Informed Consent (© 1999):** This instruction explains a doctor's duty to obtain a patient's informed consent. The instruction reads largely as it did when first approved in 1975. It was drafted based on the 1975 decision in Scaria v. St. Paul Fire & Ins. Co., 68 Wis.2d 1, 227 N.W.2d 647 (1975). The Committee updated the instruction to reflect the recent supreme court decisions, i.e., Martin, Johnson, Schreiber, Brown, and the legislature's passage of Wis. Stat. § 448.30.

- **Wis JI-Civil 1023.3 Cause: Medical Malpractice: Informed Consent Cases (© 1999):** This cause instruction was discussed in Martin v. Richards where the supreme court inferred that the instruction did not provide a sufficient nexus between negligence and damages. The Committee approved a revised cause instruction based on the standard cause instruction (Wis JI-Civil 1500).

- **Wis JI-Civil 1023.4 Cause: Medical Malpractice: Negligent Diagnosis or Omitted Treatment (© 1993):** This instruction was withdrawn in 1993 following a supreme court decision (Fischer v. Ganju) which held the instruction to be erroneous.

A. Informed Consent Case Law

Since 1973, the supreme court has recognized the doctor's legal duty to be "bottomed upon a negligence theory of liability" and not as a matter of assault and battery. Trogun v. Fruchtman, 58 Wis.2d 569, 207 N.W.2d 297 (1973). In Trogun, the "prudent patient" test was adopted for measuring the information a doctor should provide to his or her

patient. The standard adopted in Trogun was followed in Scaria two years later in 1975. Wis JI-Civil 1023.2, explaining the doctor's duty, was approved in 1975. The standard in Scaria was codified in Wis. Stat. § 448.30.

1. **Martin v. Richards, supra**. In Martin, the Wisconsin Supreme Court said that the primary force directing the parameters of informed consent is what a reasonable patient would want to know — not what doctors feel patients need to know. The court set forth the standard for physicians to follow when determining what information to provide a patient:

> The applicable statutory standard in informed consent cases in Wisconsin which is explicitly stated in Scaria and subsequently codified in 448.30, Stats., is this: given the circumstances of the case, what would a reasonable person in the patient's position want to know in order to make an intelligent decision with respect to the choices of treatment. A physician who proposes to treat a patient must make such disclosures as will enable a reasonable person under the circumstances confronting the patient to exercise the patient's right to consent to, or to refuse the procedure proposed or to request an alternative treatment or method of diagnosis. Id. at 176 (emphasis added).

Martin also held that information which must be told to the patient includes alternative forms of therapy or testing. Martin concerned the alleged failure by an emergency room doctor to inform an injured girl's father about the availability of a CT scan when the symptoms indicated possible intracranial bleeding.

Nothing was so told to the father on this or the possibility of a transfer of the patient to a Madison hospital since no neurosurgeon was available at the Fort Atkinson hospital. The girl later became a partial spastic quadriplegic allegedly due to delay in treating her. She was awarded significant damages by the jury. The supreme court held in Martin that the failure to have a 'cause' question on informed consent was not fatally defective "in this case" since the parties waived their objections to the verdict.

The 'cause' question in Martin was stated in the following way:

> "Would a reasonable person in Robert Martin's position have agreed to the alternate forms of care and treatment had he been informed of their availability?"

While claimant's attorney wanted a 'substantial factor' clause included in the instruction, defendants were arguing no informed consent issue as to Dr. Richards ought to be submitted to the jury.

The court of appeals determined that the question submitted failed to inquire that any negligence on the part of Dr. Richards to adequately inform the father caused injury to the injured girl. Reversal was ordered.

The supreme court reversed the reversal by the court of appeals concluding the parties waived any fatal defect for three reasons:

1. all attorneys agreed an affirmative answer to the above question would establish causation;
2. the defense attorney failed to object specifically to the failure to include a 'cause' question; and
3. the defense attorney has argued to the contrary before the trial court and had now switched positions.

The Committee was concerned that the court of appeals felt the suggested question in the comment to Wis JI-Civil 1023.3 was not sufficient to provide a nexus between negligence and damages, even though the instruction tells the jury a causal relationship exists if the question is answered affirmatively. In addition, the supreme court inferred it would have found a fatal defect had it not been for its conclusion the parties waived such a causation question.

2. Johnson v. Kokemoor, 199 Wis.2d 615, 545 N.W.2d 495 (1996). In 1996, the supreme court considered whether the circuit court erred in admitting evidence that the defendant, in obtaining the plaintiff's informed consent before operating to clip an aneurysm, failed: (1) to divulge the extent of his experience in performing this type of operation; (2) to compare the morbidity and mortality rates for this type of surgery among experienced surgeons and inexperienced surgeons like himself; and (3) to refer the plaintiff to a tertiary care center staffed by physicians more experienced in performing the same surgery. The court concluded that all three items of evidence were material to the issue of informed consent. Each item would have helped the patient make an intelligent decision and would have aided her exercise of informed consent.

3. Schreiber v. Physicians Ins. Co., 223 Wis.2d 417, 588 N.W.2d 26 (1999). In Schreiber, Mrs. Schreiber, the plaintiff, had previously delivered two children by caesarean section but elected a vaginal birth for her third child. During labor, she told her doctor that she changed her mind and wanted a caesarean section. He did not grant her request. The baby is a spastic quadriplegic. The parties stipulated that an earlier caesarean delivery would have resulted in the baby being normal.

The court held that a substantial change in circumstances, be it medical or legal, requires a new informed consent discussion. The court rejected the notion that the onset of a medical procedure forecloses a patient's right to withdraw consent; when consent is withdrawn, the physician is obligated under the informed consent statute to conduct a new informed consent discussion with the patient. The supreme court affirmed the court of appeals' "subjective" standard:

> In this type of informed consent case where the issue is not whether she was given the pertinent information so that her choice was informed, but rather whether she was given an opportunity to make a choice after having all of the pertinent information, the cause question is transformed into, 'What did the patient himself or herself want?' Id. at 436.

4. Brown v. Dibbell, 227 Wis.2d 28, 595 N.W.2d 358 (1999). This case involved a woman who underwent prophylactic bilateral mastectomies. The plaintiff sued her surgeon, alleging that he failed to properly disclose the risks and disadvantages of bilateral mastectomies, as well as the possible alternative treatments. The jury found both the plaintiff and her surgeon 50% causally negligent. The issue on appeal was whether contributory negligence can be a defense in an informed consent case.

While acknowledging that the physician-patient relationship assumes trust and confidence of the patient and that it would require an unusual set of facts to render a patient contributorily negligent, the court held that as a general rule, patients have a duty to exercise ordinary care for their own health and well being and that contributory negligence may, under certain circumstances, be a defense in an informed consent case.

The court noted that although the informed consent statute is silent about contributory negligence, informed consent cases are grounded on negligence theory and subject to the defense of contributory negligence.

The supreme court addressed three aspects of a patient's duty to exercise reasonable care in an informed consent action:

> • We therefore conclude that for patients to exercise ordinary care, they must tell the truth and give complete and accurate information about personal, family, and medical histories to a doctor to the extent possible in response to the doctor's requests for information when the requested information is material to a doctor's duty as prescribed by sec. 448.30 and that a patient's breach of that duty might, under certain circumstances, constitute contributory negligence. Id. at 48.

• . . . [We] conclude that generally in an informed consent action, a patient's duty to exercise ordinary care does not impose on the patient an affirmative duty to ascertain the truth or completeness of the information presented by the doctor; nor does a patient have an affirmative duty to ask questions or independently seek information. Id. at 50.

• . . . [E]xcept in a very extraordinary fact situation, a patient is not contributorily negligent for choosing a viable medical mode of treatment presented by a doctor. Id. at 53.

The court also held that the trial court erred in failing to instruct the jury about the defenses in § 448.30.

Section 448.30 establishes a standard of care for physicians in Wisconsin. It requires that physicians inform their patients of the availability of all alternative, viable medical modes of treatment unless one of six exceptions applies. The statute reads:

> Any physician who treats a patient shall inform the patient about the availability of all alternative, viable medical modes of treatment and about the benefits and risks of these treatments. The physician's duty to inform the patient under this section does not require disclosure of:
> 1. Information beyond what a reasonably well-qualified physician in a similar medical classification would know.
> 2. Detailed technical information that in all probability a patient would not understand.
> 3. Risks apparent or known to the patient.
> 4. Extremely remote possibilities that might falsely or detrimentally alarm the patient.
> 5. Information in emergencies where failure to provide treatment would be more harmful to the patient than the treatment.
> 6. Information in cases where the patient is incapable of consenting.

The supreme court in Brown declared that the optional fourth paragraph in Wis JI-Civil 1023.2 was misleading:

> . . . [T]he optional fourth paragraph is misleading because it can be construed as stating that the question of a doctor's failure to disclose information is to be answered from the doctor's perspective. The paragraph states that 'if such explanation [provided by the doctor] satisfies you that it was reasonable for the doctor not to have made such disclosures, you will find that the defendant did not fail in the duties owned by the doctor to the patient.' Wis JI-Civil 1023.2, Determining the reasonableness of the nondisclosure from the perspective of what a doctor believes should be disclosed, instead of what a reasonable patient wants to know, is an erroneous statement of the law of informed consent. Id. at 373.

B. The New Informed Consent Instructions

The revised instructions on medical informed consent are:

1. Suggested Verdict (Wis JI-Civil 1023.1). The suggested special verdict contains three questions:

> 1. Did (doctor) fail to disclose information about the (insert treatment or procedure) necessary for (patient) to make an informed decision?
>
> Answer: _____
> Yes or No
>
> 2. If you answered question 1 "yes," then answer this question:

If a reasonable person, placed in (patient)'s position, had been provided necessary information about the (insert treatment or procedure), would that person have (refused) (accepted) the (insert treatment or procedure)?

Answer: _____
Yes or No

3. If you have answered both questions "yes," then answer this question:
Was the failure by (doctor) to disclose necessary information about (insert treatment or procedure) a cause of injury to (patient)?

Answer: _____
Yes or No

2. **Negligence of Physician.** (Wis JI-Civil 1023.2). If a doctor fails to provide necessary information to the patient, then the doctor is negligent unless the doctor comes under one of the exceptions established in Wis. Stat. § 448.30.

How does the new Wis JI-Civil 1023.2 compare to the old Wis JI-Civil 1023.2?

- Both contain the "prudent (reasonable) patient standard."
- The new instruction includes noninvasive and diagnostic procedures as optional language.
- Both limit disclosure of available alternate procedures or treatments to those "approved by the medical profession."
- The new instruction does not use the term "material information." Both Martin and Kokemoor discussed the fact that "material" information must be disclosed. Similarly, the instruction does not use the term "viable" to describe the requisite discussion of alternative procedures and treatments. The Committee concluded that the words "material" and "viable" are not easily understood by jurors and that both concepts are addressed in the revised instruction.
- The new instruction tells the jury that the failure to provide necessary information is negligence.
- The new instruction lists the statutory exceptions to the doctor's duty that are contained in Wis. Stat. § 448.30. In Brown, the court said the doctor's duty varies from case to case and that the doctor's defenses may also vary. The court was unwilling to hold that the legislature intended to limit the defenses available to a doctor to these exceptions in Wis. Stat. § 448.30. It said a trial judge should be cautious about instructing on defenses beyond those the legislature has expressly provided. It should give the jury an instruction on defenses in addition to or in lieu of the statutory provisions in § 448.30 only when "evidence of a specific explanation for nondisclosure has been offered at trial" and should craft the instruction to fit the evidence and the prudent patient test.
- The last paragraph of the new instruction revises optional language dealing with a doctor's justification for not providing information to the patient. The doctor's explanation for not providing necessary information to a patient excuses the doctor only if a prudent patient

would not have wanted to know the information. The supreme court said the optional language contained in the present instruction was misleading.

3. **Cause Question** (Wis JI-Civil 1023.3). The Committee approved a new cause instruction to focus the jury's consideration of the third question in the suggested special verdict.

Based on the two decisions in Martin, the Committee revamped Wis JI-Civil 1023.3 to remove the language regarding causal relationship. Wis JI-Civil 1023.3 adapts the standard cause instruction (Wis JI-Civil 1500) to an informed consent claim.

4. **Contributory Negligence of Patient** (Wis JI-Civil 1023.4). The Committee declined to draft an instruction on contributory negligence. Although the court in Brown v. Dibbell suggested some of the patient's responsibilities when receiving treatment it said that:

> . . . as a general rule a jury should not be instructed that a patient can be found contributorily negligent for failing to ask questions or for failing to undertake independent research.

However, the court said it did not address whether a patient's duty to exercise ordinary care requires the patient to volunteer information or to spontaneously advise the doctor of material personal, family, or medical histories that the patient reasonably knows should be disclosed.

The Brown v. Dibbell court did recognize that the trial judge should have given the jury an instruction on contributory negligence tailored to the patient's duty to use ordinary care in providing complete and accurate information to the doctor in response to the doctor's question concerning personal, family, and medical histories.

1023.2 PROFESSIONAL NEGLIGENCE: MEDICAL: INFORMED CONSENT

Question _____ asks:

Did (doctor) fail to disclose information about the (insert treatment or procedure) necessary for (patient) to make an informed decision?

A doctor has the duty to provide (his) (her) patient with information necessary to enable the patient to make an informed decision about a (diagnostic) (treatment) (procedure) and alternative choices of (diagnostic) (treatments) (procedures). If the doctor fails to perform this duty, (he) (she) is negligent.

To meet this duty to inform (his) (her) patient, the doctor must provide (his) (her) patient with the information a reasonable person in the patient's position would regard as significant when deciding to accept or reject (a) (the) medical (diagnostic) (treatment) (procedure). In answering this question, you should determine what a reasonable person in the patient's position would want to know in consenting to or rejecting a medical (diagnostic) (treatment) (procedure).

The doctor must inform the patient whether (a) (the) (diagnostic) (treatment) (procedure) is ordinarily performed in the circumstances confronting the patient, whether alternate (treatments) (procedures) approved by the medical profession are available, what the outlook is for success or failure of each alternate (treatment) (procedure), and the benefits and risks inherent in each alternate (treatment) (procedure).

However, the physicians's duty to inform does not require disclosure of:

[• Information beyond what a reasonably, well-qualified physician in a similar medical classification would know;]

[• Detailed technical information that in all probability the patient would not understand;]

[• Risks apparent or known to the patient;]

[• Extremely remote possibilities that might falsely or detrimentally alarm the patient;]

[• Information in emergencies where failure to provide treatment would be more harmful to the patient than treatment;]

[• Information in cases where the patient is incapable of consenting.]

[If (doctor) offers to you an explanation as to why (he) (she) did not provide information to (plaintiff), and if this explanation satisfies you that a reasonable person in (plaintiff)'s position would not have wanted to know that information, then (doctor) was not negligent.]

COMMENT

This instruction was approved by the Committee in 2000. See Law Note at the end of Wis JI-Civil 1023.1.

Chapter Chir 11

PATIENT RECORDS

Chir 11.01 Definition. As used in this chapter "patient record" means patient health care records as defined under s. 146.81 (4), Stats.

History: Cr. Register, May, 1997, No. 497, eff. 6–1–97.

Chir 11.02 Patient record contents. (1) Complete and comprehensive patient records shall be created and maintained by a chiropractor for every patient with whom the chiropractor consults, examines or treats.

(2) Patient records shall be maintained for a minimum period of 7 years as specified in s. Chir 6.02 (27).

(3) Patient records shall be prepared in substantial compliance with the requirements of this chapter.

(4) Patient records shall be complete and sufficiently legible to be understandable to health care professionals generally familiar with chiropractic practice, procedures and nomenclature.

(5) Patient records shall include documentation of informed consent of the patient, or the parent or guardian of any patient under the age of 18, for examination, diagnostic testing and treatment.

(6) Rationale for diagnostic testing, treatment or other ancillary services shall be documented in or readily inferred from the patient record.

(7) Significant, relevant patient health risk factors shall be identified and documented in the patient record.

(8) Each entry in the patient record shall be dated and shall identify the chiropractor, chiropractic assistant or other person making the entry.

History: Cr. Register, May, 1997, No. 497, eff. 6–1–97.

Chir 11.03 Initial patient presentation. Upon presentation of a new patient, patient records shall contain the following essential elements as relevant or applicable to the evaluation and treatment of the patient:

(1) History of the present illness or complaints, and significant past health, medical and social history.

(2) Significant family medical history and health factors which may be congenital or familial in nature.

(3) Review of patient systems, including cardiovascular, respiratory, musculoskeletal, integumentary and neurologic.

(4) Results of physical examination and diagnostic testing focusing on areas pertinent to the patient's chief complaints.

(5) Assessment or diagnostic impression of the patient's condition.

(6) Treatment plan for the patient, including all treatments rendered, and all other ancillary procedures or services rendered or recommended.

History: Cr. Register, May, 1997, No. 497, eff. 6–1–97.

Chir 11.04 Daily notes. For patient visits in which the chiropractor carries out a previously devised treatment plan, daily notes shall be made and maintained documenting all treatments and services rendered, and any significant changes in the subjective presentation, objective findings, assessment or treatment plan for the patient.

History: Cr. Register, May, 1997, No. 497, eff. 6–1–97.

Statute was enacted to specifically apply to doctors. I mean the law, our law in Wisconsin, has historically distinguished between doctors and MD's on the one hand, and chiropractors treated as something completely different. Do not have the same license requirements.

The Statute on its face applies only to doctors. I think it would be unfair to assume, that the regulation means something that it doesn't say on its face. And like I said, we could simply not instruct the jury on informed consent and just be silent on that issue and inform the jury, instruct the jury on, on the negligence instructions.

MR. KOENEN: Also says on the Statute's face, there is a reason to not let this informed consent issue. There is really no evidence of what the risk is, other than it's approaching astronomical numbers. And whether there would be a duty under any circumstances to discuss that with the patient. I don't think that is a given, either. They have not offered proof that, that you know, what that risk is. And is it a risk that is one which needs to be disclosed to a patient?

MR. SCHNEIDER: I believe --

MR. KOENEN: I'm not done talking.

MR. SCHNEIDER: I'm sorry.

MR. KOENEN: Doctors are not obligated to disclose every single risk under any Statute. No doctor is. And unless there has been an establishment that that is a risk within the world of likely possibilities, I don't think there is a duty in the first instance to do that. Whether the Statute says that informed consent needs to be obtained or not, it's got to be informed consent about something that is possible to have have happen, not some astronomical thing.

MR. SCHNEIDER: Well, there is evidence that, that a reasonable chiropractor would inform a patient about the risk of a neurovascular injury. Dr. Makowski(sp) testified that that would be the standard of care. Doctor Murphy -- or I'm sorry, Dr. Wilder even testified that he informs his own patients about the risk of a neurovascular injury related to a chiropractic adjustment.

I think there is evidence that there is a risk and that it would be reasonable to inform a patient of that risk, as part of obtaining informed consent. But nonetheless, we are willing to forego informed consent instruction and simply instruct the jury on negligence.

MR. KOENEN: Then they don't have to deal with the language, that I think it explains why.

THE COURT: Yeah.

MR. KOENEN: Right.

THE COURT: Remoteness.

MR. SCHNEIDER: I don't think it's fair to impose a remoteness standard when there is no law pertaining to chiropractors that imposes a remoteness standard.

THE COURT: But don't you think if we ever get to the point where there is an Instruction dealing with chiropractors, that's correct, that actually remoteness will be part of it?

MR. SCHNEIDER: I don't know, I can't answer that. I mean here we have a gray, a risk of a grave, grave consequence. And that has to be balanced I think, with the

possibility of the occurrence in determining whether or not it should be discussed.

MR. KOENEN: Judge, you could rule as a matter of law, that he's done all he needs to do in terms of explaining the likely reasonable risks. He did obtain informed consent, written, that, that you -- that is in evidence and undisputed. You know I guess, the legal issue presented to you, is there a further duty now to go beyond that and talk about astronomical risks? And I think given the fact that, that he's complied, there is informed consent, he's complied with the Statute. There is no dispute on that.

Now the only remaining issue, is there an obligation that is not covered by the Statute to go beyond that and talk about astronomical risks? And risks of things that are, you know, by both sides' admission, are so remote that it's unlikely to ever happen. You know, you can as a matter of law state that, that based on the evidence, there is just not an issue on that.

MS. SCHNEIDER: There is absolutely an issue on that. Gary Hannemann

testified he was never informed of a number of risks that, that Dr. Boyson claims he informed him of. Dr. Boyson acknowledged that he never informed Gary Hannemann of the risks of a neurovascular injury. If we are going to use the standard Instruction, I would like to request we add a sentence to the end of the second paragraph.

THE COURT: Okay.

MR. SCHNEIDER: Which would be um, a chiropractor has a duty to disclose what a reasonable chiropractor in the chiropractic community in the exercise of reasonable care would disclose to his patient.

The Instruction talks about, the Instruction's really focusing on the patient and what is reasonable for the patient. But I think we also want to touch on what the chiropractic community does in terms of meeting the standard of care.

THE COURT: You got that in here?

MR. SCHNEIDER: It's part of a sentence that is included in here. It's the second sentence of my proposed Instruction. I was suggesting that we basically just, just use

a portion of that sentence, so it would say, a chiropractor has a duty to disclose what a reasonable, prudent chiropractor in the chiropractic community in the exercise of reasonable care would disclose to his patient.

MR. KOENEN: I disagree, I think the law as it is, it's very balanced toward what a reasonable patient would want to know. That the law is very clear on that, that it's supposed to be what a reasonable patient would want to know, or need to know, not --

MR. SCHNEIDER: But if we evaluated whether or not Dr. Boyson has completed the standard of care, I think there is evidence of what the standard in the chiropractic community is. And I think that's important to evaluate, in terms of whether or not he's met the standard of care. And this Instruction again is related to case law regarding physicians. And there is no clear-cut Instruction related to chiropractors. I think it would be reasonable for the jury to consider what the chiropractic community does in determining whether or not Dr. Boyson was negligent.

MR. KOENEN: I disagree, Judge.

THE COURT: I think we are aruging that. Get this thing redrafted and see what it looks like. It's one issue that we have.

MR. SCHNEIDER: Yes. The other issue was I -- one of the others is I believe Mr. Koenen wanted an Instruction on the absence of material witness.

THE COURT: 410. Hear his argument first.

MR. KOENEN: There are numerous physicians who saw Gary Hannemann immediately after the stroke. And Dr. Reider of radiology, Dr. Yasbak, to name a few, have all been mentioned to the jury as people who looked at him, diagnosed him, tried to figure out what was wrong, and they were not called. I think that there is an absence, is an inference that, that inferences can be drawn, drawn that that absence --

THE COURT: Ago head.

MR. SCHNEIDER: Your Honor, first of all, we filed the medical records in a timely fashion pursuant to the Statute. And we

give 1500 in connection with Hannemann, Hannemann's negligence, I would agree.

MS. SCHNEIDER: But then are you saying you also want this 1023.8?

THE COURT: 1023.8, we agreed it's one of the -- yesterday we agreed that we are going to give that. It's just that it was cut down.

MS. SCHNEIDER: Right, but are you saying --

MR. KOENEN: I want -- yes, I want 1023.8, with Paragraph 5, less the last two sentences. And also believe you got to give the eighth paragraph, as well. Talks about Gary Hannemann suffered from an illness before the treatment by Craig Boyson. In answering the question of damages you will entirely exclude from your consideration all damages which resulted from the original illness. Only consider the damages Gary Hannemann sustained as a result of the treatment by Greg Boyson.

THE COURT: I'm not going to give that paragraph at all, I don't think it applies. I think that says, if we say that's correct, that some of the damages caused here,

and the plateau, what more damages is caused by the adjustment, I don't think this is that kind of a case. Because it's either, either that was the cause, or this was the cause. They weren't both the cause, and then differentiate between the two.

MR. KOENEN: I think 9 talks about distinguishing between the two. 8 just says you got to not award for anything related to the spinal menengitis and only award for things you think Dr. Boyson did. It was a black and white language.

The one after it talks about distinguishing between the natural results of the thing and of the disease, and then how the chiropractic adjustment may have enhanced it. I agree that that isn't what we've got here. But 8 says he suffered from an illness, and to the extent you believe his problems are due to the illness they are not caused by Doctor Boyson you are only to award what Dr. Boyson caused in terms of damages. And it's the Instruction to separate--

THE COURT: Still claiming of piggybacking here or subtracting.

MS. SCHNEIDER: I think if you, if you want the first and second sentences you said of Paragraph 5, the cause question where there was a causal connection, that same Instruction I think, I think that takes care of it if that is what you're concerned about.

THE COURT: Run a copy of 120 -- 1023.8. The original Instruction, 1023.8. You want me to instruct first or last?

MR. PETERSON: What do you want?

MR. KOENEN: Probably before. I suppose then they know what the rules are. I don't care.

MR. PETERSON: Before is fine with me. Actually I hate sitting around, waiting for you.

THE COURT: You know, the old fashion way is to do it last. If I get agreement, I do it first. I would rather do it first.

MR. PETERSON: Rather do that too.

MR. KOENEN: Fine.

MR. PETERSON: It's a real empty feeling, sitting around that counsel table waiting for the Instructions to be read.

THE COURT: Where is the draft of 1023.2? Let's keep on 8, now that I got a copy of it. You want added back in what we had, assert the appropriate cause language to avoid duplication. Jury Instruction 100 should not be given, the following two bracket paragraphs are used. Well, which would seem to infer that you can go either way.

MS. SCHNEIDER: Uh-hun.

MR. KOENEN: Troy on the committee that drafted all these things?

THE COURT: Yes, he is.

MR. KOENEN: Get him in here, what's he doing?

MS. SCHNEIDER: I think 1500 takes care of it.

THE COURT: I don't have any problem reading, reading this portion twice. Because we are actually applying it to Questions Two and Four.

MR. KOENEN: Duplication, is not the harm. It's if you don't get the right rule in there, that's the problem. But I do think, and very strongly about this, there has to be some explanation to the jury that they are not

to -- if they believe, is that the research of the issue is already resolved.

(Messenger brings paperwork to Mr. Koenen:)

THE COURT: The more I look at this, I'm not going to do that either. I'm just going to read 1500.

MS. SCHNEIDER: Okay.

MR. KOENEN: Just so I can make a record, Judge, I understand you're ruling, I just want to make sure --

THE COURT: Go ahead.

MR. KOENEN: -- that the record is clean, 1023.8, I'm looking for the language to be read, it looks like -- in case this version is different than what the Court has, the evidence indicates without dispute that when plaintiff retained services of Dr. Boyson and placed himself under the chiropractor care was suffering from some disability resulting from prior problem or illness, that condition can not be regarded by you as in any way having been caused or contributed by the negligence on the part of the chiropractor. This question asks you to determine whether such condition as it was, has been aggravated or further impaired

as a result.

Also wanted the Paragraph 8, which is, it will be necessary for you to distinguish and separate the natural results and damages that flow from the original illness and that flow from the treatment. There has to be a way for the jury to separate those out.

THE COURT: You made your argument.

Now the other question is to get these in some kind of an order. Get the second page, I don't know where the heck this goes.

MS. SCHNEIDER: This negligence Instruction?

THE COURT: No, I've got -- I got parts laying all over the place.

MR. PETERSON: Are we done?

MR. KOENEN: Still have 1023.2 to finish up. Judge, I just think it's good with one, one little omission, that the last paragraph I think needs to be read.

THE COURT: No, it doesn't. Make your argument.

MR. KOENEN: Okay. I think the last paragraph that says 1023.2, if a doctor

offers to you an explanation of why he or she did not provide the explanation, if the explanation satisfies you, that that is not negligence. I mean, that's the heart of the balancing of this, of this informed consent responsibility. I think it's very important.

I also think there ought to be some language in there that says he's obligated to talk about what is known at the time. We are in 2003. He's back in 1997. There has been plenty of testimony that back then things aren't as they are now. And some reference to, to the state of the art at the time.

MR. PETERSON: Actually, I think the only evidence -- excuse me, the only evidence directly on that point was that, that the statistics were much worse for the doctor back then. I think Dr. Wilder said the statistics now seems to indicate that it's more remote than was believed before. That's the only evidence on that.

MR. KOENEN: Also think you have to have the questions then to track this -- the ones set out in 1023.1.

MS. SCHNEIDER: Well I mean, I

guess I've already made my record on why I disagree with 1023.2 as it's drafted. I think we are imposing limits on informed consent that doesn't exist anywhere in the law by using this Instruction. The chiropractic regulations does not indicate that a chiropractor is not obligated to provide information about remote possibilities. That requirement has only been imposed upon informed consent as it relates to physicians.

THE COURT: Everybody got their argument on the record now?

MR. KOENEN: Are you going to give the questions?

THE COURT: Got to look at. Got to look at the verdict yet.

MR. KOENEN: Okay.

MS. SCHNEIDE: Judge, are, are you reading this negligence Instruction that we formulated? It doesn't have a number on it.

THE COURT: I don't know where it is right now. I've got to get my stuff in order.

MS. SCHNEIDER: Okay.

THE COURT: I can't even find the

person" is the first paragraph, or "Ordinary care" is the first paragraph?

MR. SCHNEIDER: "Every person", I believe.

MR. KOENEN: "Every person".

THE COURT: So this is the right draft?

MR. KOENEN: No, the other one.

THE COURT: Okay. So here we are. Any comments on this?

MR. KOENEN: On the verdict?

THE COURT: Yeah.

MR. KOENEN: Other than you take out 61.

MR. PETERSON: Is that where you're going to make the comment, Judge?

THE COURT: Yeah.

MR. PETERSON: Okay.

MR. KOENEN: The other thing, Judge, I think now if this Informed Consent is going to the jury, then we've got to ask the question that is set out in 1023.1.

MS. SCHNEIDER: Judge, I disagree, I think we are vying with the negligence question. I think that is just going to

confuse the jury and confuse the issue. The issue is whether or not he was negligent.

MR. PETERSON: I think that's intended for questions where the only issue is Informed Consent. That is not the only --

MR. KOENEN: One of my partners who tried a med-mal case down in Waukesha County -- that is how they framed it exactly. That is what has been created. It used to have the -- it was a tort of Assault and Battery. If you did something without first getting permission, then they decided that was too weird, but it wasn't quite negligence. So they have drafted this, this second set of questions. Again, I prefer the whole thing not be made an issue. But if we are going to have it, I think we got to follow the rules.

MS. SCHNEIDER: Just because some other Court decided to frame a verdict that way, that doesn't make it the rule.

MR. KOENEN: Wisconsin Civil Jury Instructions; it's not just the Court.

MR. PETERSON: That question Number Two is downright misleading.

MS. SCHNEIDER: I think using

these questions will confuse and mislead the jury.

THE COURT: Certainly confusing to me. I mean, you know, is this case based upon Informed Consent, or is it based, based upon negligence?

MS. SCHNEIDER: I mean, there --

THE COURT: What do we do with the negligence -- throw those off?

MR. KOENEN: I'm not, I'm just a messenger. This is what the law has turned into when you go down this road of Informed Consent. It's a, a tort, bottomed in negligence, is what that note says, whatever the heck that means. But it isn't, you know, you don't just -- it's not a standard of care issue. It's a, did he obtain informed consent issue, before proceeding separate from this standard of care.

THE COURT: So then when you compare negligence, what are you comparing? If you answered yes to, to Questions Two and Four relating to th

e doctor, or to one of those Questions Two and Four, then make the comparison. And yes to, to

Six. Which is the, which is, is the defendant's negligence at cause? So you get one yes, in the two cause questions for the defendant; and one yes in the two questions, in the cause questions, for the plaintiff, then you compare. So they could say he wasn't negligent as to treatment; but he was negligent as to not failing to provide information.

MS. SCHNEIDER: It would result in way too many questions. And I think it would just confuse and mislead the jury. It's going to make the issues very unclear. The negligence questions encompass Informed Consent of the jury is being struck on Informed Consent. We are using the Informed Consent Instruction that encompasses the Information that, that questions are eliciting. I think that takes care of the issue.

MR. PETERSON: Judge I know, it's my -- with your leave ---

THE COURT: Go ahead, please.

MR. PETERSON: Well, it seems to me that given that Murphy decision what they did is that they said this is a creature of a different nature in chiropractic. Doesn't

really talk and address the fact that there was this 1997 change. I wonder if it was even before the Court that this was a specific regulation now pertaining to Informed Consent with chiropractors.

All through the trial including Dr. Wilder, Dr. Wilder considered Informed Consent as a component of the standard of care. He specifically referred to it as a component of the standard of care. The jury has in every time they have heard about Informed Consent in the course of this trial, it's either been in the context of general negligence of the doctor. The question of general negligence of the doctor, or the only exception to that, was the reading of the regulations so that they knew in fact there was a regulation.

I think in the context of what we have been left with after Murphy that, that it's a general negligence question and that is the way we presented it all the way through the trial.

I understand Mr. Koenen's concern about the Instructions. And I understand the Courts are, Court's ruling, but I think putting the special verdicts in isn't consistent with the way the

jury was presented with the evidence, isn't consistent really with the law. And it is confusing as can be.

MS. SCHNEIDER: The Instruction and the verdict contained in 1023 is based on the Statute 448.30, which is not what the law is pertaining to chiropractors. I think the verdict should stay the --

THE COURT: We are not going to mess with the verdict. Let the appellate Court straighten this case out if it leads to it.

THE COURT: Interested in the order I'm going to read this, give these Instructions?

MR. KOENEN: Not too concerned, Judge.

MS. SCHNEIDER: I'm assuming you you have them in numerical order.

THE COURT: Got changed a little bit because I don't tell them about the Five-Sixths verdict --

MS. SCHNEIDER: Until the --

THE COURT: -- until the end.

MS. SCHNEIDER: And 109 is last, or second last. Closing.

skill and judgment or solely because a bad result may have followed his care and treatment. The standard you must apply in determining if Craig Boyson was negligent was whether Craig Boyson failed to use the degree of care, skill and judgment which reasonable chiropractors would exercise given the State of chiropractic knowledge at the time of the treatment in issue.

Use this paragraph -- (Judge pauses:) If you find from the evidence that more than one method of chiropractic treatment for Gary Hannemann's condition recognized as reasonable given the state of chiropractic knowledge at that time, Craig Boyson was at liberty to slect any of the recognized methods. Craig Boyson was not negligent because he chose to use one of these recognized treatment methods rather than another recognized method if he used reasonable care, skill, and judgment in adminstering the method.

You have heard testimony during this trial of witnesses who have testified as experts. The reason for this is because the degree of care, skill, and judgment which are reasonable

chiropractor would exercise is not a matter within the common knowledge of laypersons. This standard is within the special knowledge of experts and can only be established by the testimony of experts. You, therefore, may not speculate or guess what standard of care, skill and judgment is in deciding this case but must rather must attempt to determine it from the expert testimiony that you heard during this trial.

A chiropractor has the duty to provide his patient with information necessary to enable the patient to make an informed decision about a procedure and alternative choices of treatments. If the chiropractor fails to perform this duty, he is negligent.

To meet this duty, to meet his duty to inform the patient, the chiropractor must provide his patient with the information a reasonable person in the patient's position would regard as significant when deciding to accept or reject the medical treatment. In answering this question, you should determine what a reasonable person in the patient's position would want to know in consenting to or

rejecting a chiropractic treatment.

However, the chiropractor's duty to inform does not require disclose of:

Information beyond what a reasonably, well-qualified chiropractor in a similar classification would know; extremely remote possibilites that might falsely or detrimentally alarm the patient;

Every person in all situations has a duty to exercise ordinary care for his own safety. This does not mean that a person is required at all hazards to avoid injury; a person must, however, exercise ordinary care to take precautions to avoide injury to himself or herself.

Ordinary care is the care which a reasonable person would use in similar circumstances. A person is not using ordinary care and is negligent, if the person, without intending to do harm, does something, or fails fails to do something that a reasonable person would recognize as creating an unreasonable risk of injury or damage to a person or property. Question No. 2 and No. 4 read as follows: If you answered question 1 above

STATE OF WISCONSIN CIRCUIT COURT BRANCH IV OUTAGAMIE COUNTY

GARY HANNEMANN,

Plaintiff,

vs.

CASE NO. 00-CV-765

CRAIG BOYSON, D.C.,

Defendant.

TRANSCRIPT OF MOTION HEARING
April 4, 2003

Transcript of the proceedings had in the above action before the HONORABLE HAROLD V. FROEHLICH, Circuit Court Judge, Branch IV, Outagamie County, held at the Outagamie County Justice Center, in the City of Appleton, Outagamie County, Wisconsin, commencing on the 4th day of April, 2003.

APPEARANCES: JOLENE D. SCHNEIDER, Attorney at Law, appeared on behalf of the Plaintiff.

PATRICK F. KOENEN, Attorney at Law, appeared on behalf of the Defendant.

GARY HANNEMANN, Plaintiff, appeared in person.

(In open court commencing at 2:32 p.m.)

THE COURT: This is Gary Hannemann versus Craig Boyson, 2000-CV-765. Please state your appearances for the record.

MS. SCHNEIDER: Plaintiff appears in person and with his attorney, Peterson, Berk & Cross, by Jolene Schneider.

MR. KOENEN: Pat Koenen for the defendant.

THE COURT: Go ahead.

MR. KOENEN: Your Honor, it's always difficult and, frankly, a little uncomfortable to bring a motion like this where we're asking the Court to say that there was a mistake made in the trial. I understand it, your job, particularly during the jury instruction conference, is difficult. You've got a jury waiting and attorneys throwing papers back and forth on a table to you.

But as difficult as it is to bring this type of motion, I think it is important that we do this because I sincerely believe there is something fundamentally wrong with the verdict that we submitted to the jury and the instructions that were sent to them. And out of fairness to Dr. Boyson and in the interest of justice, I think we have to look at that and determine if there was a mistake and, if so, was it substantial

and did it prejudice my client? And I think it did.

The fundamental problem with the verdict is that it treated the concepts of negligence in treatment the same as negligence for failing to obtain informed consent. Unfortunately, these two concepts are not interchangeable. They're separate and distinct, and they can't be handled the same.

Negligence in treatment has to do with failing to do something properly during the treatment of a patient, such as failing to make a proper diagnosis or failing to do something right in the care of the patient. Negligence in failing to obtain informed consent has to do with the failure to share information with a patient. It has nothing to do with the actual treatment but, rather, the conveying of information that a patient -- a reasonable patient would want to know about the procedure. These are separate. They're distinct. They're not interchangeable; and, most importantly, they have separate proof requirements.

Now, this isn't my, you know, belief. This is clearly confirmed in the appellate law that we have in the State. Johnson, the Supreme Court case, which I've cited in our brief, and Finley versus Culligan, which I've also cited in the brief, clearly states they're separate and distinct towards, and they're separate and

distinct proof requirements, and they cannot be treated interchangeably.

And in light of this law and the way it's developed in every medical malpractice case where there are claims of negligence in treatment and claims of failure to obtain informed consent, there are separate verdict questions asked. There are two separate sets inquiring into the essential elements of both -- of both torts, and in no case would it be permitted to treat them the same as we've done here.

Now, interestingly, in reviewing the plaintiff's brief in opposition to my motion, they're not disagreeing with this statement of the law, and they have not said that I've misinterpreted Johnson or Finley or have in any way misstated that they're two separate and distinct torts. I think we'll hear what they have to say, but the omission of any statement to the contrary and the lack of any cases to the contrary makes it quite clear that what we're saying is accurate legally.

What they've tried to do though is step around this obvious point in the law by saying that informed consent principles don't apply to chiropractors; that that's medical malpractice law we're citing. We're in a chiropractic malpractice case, and because of that,

all of this that I've cited is inapplicable.

And their argument though, if you look at it and you look at the basis of it, really isn't persuasive or with any legal merit, and the fundamental underpinning they have for this is this Murphy case. It was discussed in our instruction conference, and it's highlighted quite heavily in their brief. They basically say that Murphy stands for the proposition that 448, Informed Consent, doesn't apply. And I think, first of all, they're overstating what that case means; but, secondly, it's clearly not applicable to this case.

In Murphy, the treatment that was involved occurred in January of 1993. It's four years before Wisconsin Administrative Code 1105 -- 11.02(5) was created. The law changed after Murphy was decided. There would have been no -- no legal basis similar to this case in Murphy. I think that's a very, very important factual distinction.

I also believe it's very important that that -- the issue of whether or not informed consent wasn't squarely presented to the Court of Appeals as it is in this case. That had to do with a failure to refer a patient with low back pain, chiropractor continually treated. There's no allegation that the chiropractor

caused the low back pain. It's just a failure to refer.

This is far different. This case is far different where they're alleging that a chiropractic adjustment caused a complication, and I -- I think the factual dissimilarities, the timing of when the treatment in Murphy took place as compared to the change in the law, makes that case inapplicable to this particular situation.

I also think -- and this is perhaps more important -- that, logically, the argument that they're putting forward doesn't make sense when you look at our laws. Why would the law treat the informed consent obligations of a chiropractor and the defenses it limits to that any different than it would treat it for a medical doctor? Surgeons, obviously, have a duty of informed consent. Dentists would have a duty of informed consent. Physiatrists -- podiatrists would have that, and physiatrists, physical medicine doctors who actually use principles of physical therapy and manipulations, would have an obligation of informed consent. Why would it be that a chiropractor should be treated any different or have any less of a proof requirement for someone accusing him or her of not obtaining informed consent than any of these other

people? If you claimed informed consent against anybody in that other group, you'd have to prove all of the elements. Why would it be logically that the law would treat a chiropractor any differently? Why would the law treat the chiropractor any different than a common person? This Court, I'm sure, has had claims of assault and battery with just normal people. There is a defense to that in the form of consent.

What I'm pointing out here is, the law of informed consent was a common law principle that predated 448 when it was codified for medical doctors, but 448, the statute, is nothing more than a codification of the common law, which existed prior to nineteen -- I think -- seventy-four. It's a principle of informed consent that grows out of this concept of assault and battery and the need to get someone's permission before they're touched that existed in the common law long before 448, and it still exists in the common law, and there is no reason that the law should carve a little exception out for chiropractors and treat them any differently.

So factually, logically, legally, there is no reason in this case to merge those two concepts together.

What the plaintiff wanted in this case and what

they ultimately got was a chance to accuse Dr. Boyson of failing to obtain informed consent. They argued that over and over with every single witness, and they argued it in closing argument. They got to do all that, make all those accusations, put in that evidence, but then the Court didn't require them to establish the elements of informed consent to answer that line of questions that must be answered by a jury to obtain liability on an informed consent claim. They weren't required to do that. They got the benefit of the accusation, they got the benefit of some powerful argument, but they didn't have the obligation of answering the questions that are essential to an informed consent claim.

Had the jury been given those questions, it is possible that they could have said, yes, Dr. Boyson was negligent for failing to share information about the treatment, the risk of a stroke, but they could have also answered -- and we'll never know -- we'll never know the answer to the first question because it was never asked, but they could have answered a second question that I asked the Court to give, would a reasonable patient have refused the treatment even if they got the information?

If they would have said, yes, he's negligent for

failing to disclose the information but no, a reasonable patient in Mr. Hannemann's position wouldn't have refused it, that's a defense verdict. And because those questions were never asked, we'll never know why they found Dr. Boyson negligent.

We'll never know if they would have possibly found that a reasonable patient wouldn't have refused the treatment; and Dr. Boyson, by virtue of that, is deprived of a very legitimate and reasonable possibility of a defense verdict. And the law says, when that occurs, when there is a reasonable possibility of a different outcome, that is prejudicial. That is depriving a client -- or a party to a lawsuit of a substantial right, and it undermines the confidence in the outcome. It undermines the confidence that the jury had the right law and the right questions, and the whole result becomes highly suspect as to what did they mean, why did they find negligence?

And under our law and under the statutes, this Court has the power and, in fact, the obligation to look at this and say, you know, is that right? Was that done properly? And is there a reasonable possibility that the outcome in this case was somehow affected by that?

And I think that that -- that is in fact what happened here, and I think that, for that reason, Dr. Boyson is entitled to another trial and another opportunity to ask a jury and argue to a jury that the failure to disclose this information really would not have made any difference.

So for that reason, Judge, I think the verdict and its formulation is improper and we should have another trial.

The second problem -- major problem, I think, with the case -- and it's, I think, more clear -- is the instructions on informed consent that were given. This Court decided to give an instruction on informed consent, but it deleted the last paragraph of the instruction, 1023.2. Now, that deletion, which said that if a doctor provides a reasonable explanation for why he didn't disclose certain information such that a reasonable patient would agree that it wasn't obligated to give that information, he's not negligent. That was taken out.

Now, in this district, District 3, in a very similar case, Judge Hoover looked at an instruction where a judge in your position took that same paragraph out and said that was prejudicial. That's reversible error and sent it back for a retrial because of that.

The judge said that that last paragraph does not subsume all those other exceptions that precede it. It's separate and it needs to be given, and if it doesn't, it doesn't balance out fairly the obligation of a doctor to give information with the limits on that. And that last paragraph's critical because it specifically says if the explanation, no matter what it is, would satisfy a reasonable patient -- not this patient but a reasonable patient -- then he's not negligent for not sharing information. And to take that away, I think, imbalances the obligations with the limitations; and in this district, according to Judge Hoover, that is reversible error.

In this case, Dr. Boyson said, you know, in his mind -- and Dr. Wilder confirmed this -- there was controversy as to whether or not the existence of the risk of a stroke even was real. That was not an assumed or established fact back in 1996 and 1997. There is no place in Your Honor's instruction that permits that as an explanation. The way we have it is, you don't have a obligation to disclose remote risks, but that presumes there is a risk at all; and in this case, I think it's not only just not remote in Dr. Boyson's mind but not even real, and I think there is a very reasonable possibility that a juror, using the

reasonable patient standard, could say, yeah, I don't think it's necessary to talk about controversial things that aren't even well established in the field as risks.

So I think in light of Brown and in light of the facts of this case and in light of the deletion of that very important paragraph, again that's an error that could very well have changed the outcome of the case, and there should be a new trial ordered on that ground as well.

I also believe, in light of the existence of -- co-existence of a diagnosis of spinal meningitis and the adjustment, the causation instruction should have told the jury there to separate out whatever disabilities or problems they felt were due to spinal meningitis as opposed to chiropractic adjustment.

We clearly brought you the testimony of Dr. Viste and Dr. Hauton, the neuroradiologist and neurologist, who said that they believe that the problems that the patient was having was due to spinal meningitis. The jury, theoretically, could have felt that Dr. Boyson caused some harm, but the spinal meningitis did something as well, and they were not given an opportunity or instruction that they're to differentiate between the two. And I believe that, as

well, is a problem.

For those reasons, Judge, and, most particularly, I think in the interest of fairness to the defendant and in the interest of justice, a new trial should be ordered in this case.

THE COURT: Counsel.

MS. SCHNEIDER: Judge, this is not a medical malpractice case. This is a chiropractic negligence case, and the Court submitted the correct form of verdict to the jury. The special verdict proposed by the defense, 1023.1, does not apply to the failure of a chiropractor to obtain the informed consent of his patient. 1023.1 was developed based upon the law for physicians as set forth in Wisconsin statute 448.30, which does not apply to chiropractors on its face. And that is consistent with the longstanding tradition of Wisconsin law differentiating between rules and regulations that apply to physicians, on the one hand, and different rules and regulations that apply to chiropractors on the other hand.

Physicians and chiropractors, for example, are not held to the same standard of care. The Kerkman case, which we cited in our brief, specifically held that chiropractors are held to a separate chiropractic standard of care. The licensure requirements for a

physician and a chiropractor are also distinct, and in Chapter 446 of the Wisconsin Statutes, the Chiropractic Examining Board authorizes the creation of administrative regulations, and from that, we get chiropractic 11.02(5), which basically states that all patient records shall include documentation of the informed consent of the patient. That is drastically different from the requirements that are imposed upon physicians that are contained in 448.30.

Now, the legislature has elected to create this very specific statute that applies, on its face, only to physicians. It's contained in chapter 448, which regulates medical practices. We have, on the other hand, this administrative regulation created by the Chiropractic Examining Board that applies only to chiropractors. They are completely distinct standards for completely distinct professions that are regulated in distinct ways under our laws, and there is just no basis for concluding that a statute designed to regulate physicians should apply to chiropractors.

Now, in the Murphy case, the plaintiff brought a negligence action against her chiropractor, and she basically had a two-pronged theory in bringing her case. One was that the chiropractor was negligent in not referring her for medical treatment; and, second,

that he was negligent in failing to obtain her informed consent. And in support of her theory of negligence in failing to obtain informed consent, she specifically cited the statute 448.30, and the Court of Appeals looked at that and said, no, that doesn't apply to chiropractic. This statute, on its face, applies only to physicians, and 448.30 is applicable to physicians and to cases that derive from medical malpractice claims. It does not apply whatsoever to a chiropractic negligence case.

Based upon the clear language in the statute in the Murphy case, it's clear that anything deriving from that statute would not apply to a chiropractic negligence case.

The special form verdict contained in 1023.1 was created based upon the law as set forth in section 448.30. Therefore, it does not apply to a chiropractic negligence case, and the Court was correct in refusing to submit that form verdict to the jury.

The failure for a chiropractor to obtain the informed consent of his patient just simply constitutes negligence, and the defense is quite concerned about the fact that there do not seem to be the same types of limitations on that obligation as there clearly exists for physicians. That's because the legislature chose

to create those limitations for physicians. If there are to be similar written limitations on the scope of the duty of a chiropractor to obtain informed consent, those limitations are not for us to create here. Those limitations should be created by the legislature or by the Department of Regulation & Licensing. They have, for whatever reason, chosen not to create such specific parameters on the duty of a chiropractor to obtain informed consent.

Prior to 1997, there was no written regulation at all requiring chiropractors to obtain informed consent. Since that time there has been no modification to the Administrative Code provision that's in place. Presumably, there is a reason for that. It's not our job to usurp the role of the legislature and create obligations that they specifically decline to create.

The defense has argued, I think, today and back at the instruction conference that if we don't apply this scope of informed consent that exists for physicians, then the obligation of a chiropractor to obtain informed consent is limitless, and that's simply not true.

The limits upon that obligation are those that would be imposed by a reasonable chiropractor under the same conditions that were faced by Dr. Boyson. And we

heard lots of testimony during the trial from Dr. Murkowski, the plaintiff's liability expert; from Dr. Wilder, the defense liability expert, as to the incidence of neurovascular injury resulting from cervical manipulation, as well as the necessity of informing a patient of that risk. And even Dr. Wilder, the defense liability expert, testified that he informs his own patients of this risk. And so it's not as though, if we don't apply 448.30 in this situation, that it's just a slippery slope with no end. There are limits, and that is what the jury determined in deciding whether or not Dr. Boyson met the standard of care. Use of 1023.1 would have just simply confused and misled the jury because it stated incorrectly the law that applied to this case.

Now, even if the Court would determine that it was error to use that -- or decline to use that particular verdict form, it was really harmless because the jury was informed of the law for physicians under section 448.30, when the Court instructed the jury on informed consent using the Court's version of 1023.2.

The Court will recall that the plaintiff, in fact, objected to the Court's use of 1023.2 at trial. Instead, the plaintiff submitted his own proposed instruction on informed consent. That was not derived

from the statute applying to physicians. We, instead, submitted a proposed instruction that was based upon the Black's Law Dictionary definition of informed consent.

The Court overruled our objection and decided to use 1023.2. That instruction, as a whole, correctly stated the law under 448.30, and, if anything, the defense benefited from the Court's use of that instruction because for the reasons I've already stated. The instruction, 1023.2, does not apply to a chiropractic negligence case. It's derived from medical malpractice cases, which are not binding or precedential in relation to chiropractic negligence cases, and they're based upon a statute that clearly, on its face, does not apply to chiropractic negligence.

The cases that the defense cites related to the use of 1023.1 and 1023.2 are medical malpractice cases, cases brought under chapter 655, which does not apply to chiropractic; cases involving alleged violations of the statute 448.30, which do not apply to chiropractic. Therefore, those cases are not binding on this Court and do not provide us with any binding precedent relating to this issue.

Now, the defense indicates that there was evidence from which the jury might have concluded that there was

no basis for a risk between the risk of neurovascular injury following a cervical adjustment, and I believe the overwhelming evidence suggested that in fact there was a risk. There was dispute about the incidence of such a risk in 1997, but both plaintiff's liability expert and the defense liability expert conceded that there was, in fact, a risk; and, in fact, the evidence showed that the belief back in 1997 was that the incidence of such an injury occurring following cervical adjustment was even higher in 1997 than it was today. So the assertion that the jury would have been misled in some way, I don't think, is supported by the evidence whatsoever.

With respect to causation, I don't believe there is any probability that the jury was misled. The defense was requesting the Court to use the final paragraphs, 1023.8, which simply did not apply to the facts of this case. Those paragraphs address situations where there may be an aggravation of a pre-existing condition or where two health conditions may have acted in concert to cause a particular injury to a plaintiff. And here there was no evidence that anything such as that existed.

Dr. Viste, on behalf of the defense, proffered a theory whereby the cervical adjustment had absolutely

nothing whatsoever to do with Mr. Hannemann's injury, and the -- the plaintiffs, on the other hand, maintained throughout the trial that it was the cervical adjustment that caused Mr. Hannemann's injury.

There was no evidence presented to the jury whatsoever that, in any way, the meningitis and the cervical adjustment could have somehow acted together to cause the injury. There was no evidence presented that the cervical adjustment could have aggravated the condition of meningitis, which could have exacerbated Mr. Hannemann's injury. Therefore, the Court was correct in declining to use that instruction and instead properly instructed the jury using the standard causation instruction No. 1500.

The interest of justice do not support a new trial in this case. The interest of justice support the finality of this jury's verdict. The -- this case is not a case where the real controversy was not tried. The real controversy was tried. This case was brought as a negligence action. The jury heard quite a heavy volume of evidence on negligence. Closing arguments consisted of vigorous arguments by both counsel as to whether or not Dr. Boyson was negligent. The failure of Dr. Boyson or any chiropractor to obtain the informed consent of his patient is simply negligence.

It's a component of the chiropractic standard of care, and the jury, after hearing all of the evidence and considering the Court's instructions, rendered a conclusion, and that should not be disturbed by this Court.

MR. KOENEN: Briefly, Your Honor. Plaintiff's argument, if I understand it right, seems to suggest that the duty of informed consent and all of its limitations must flow from the legislature, and if it's not -- if the legislature in 448.30 or some other statute doesn't set it out, then it doesn't exist. That gives the legislature, frankly, way more credit than I think it deserves. They -- 448 was nothing more than the legislature codifying the existing common law that existed long before the mid 1970s. This whole concept of informed consent, it grew out of the assault and battery laws. It existed well before, and it exists for chiropractors, doctors, anybody who was accused of, in that time, committing a battery upon somebody without their permission that led to an injury. It really -- to say that, unless the legislature specifically codifies this with respect to chiropractors, ignores years and years, decades, of common law created by the courts, applicable to all, that predated the creation of 448.30.

The argument also mixes and matches. It suggests that because 448.30 applies only to doctors, therefore, special verdict questions need not be asked of, you know, requiring each of the elements of informed consent. 448.30 has nothing to do with verdict question formulation. It has to do with instructions and what the law is and whether there is or isn't informed consent.

This Court though -- and it's a total judicial function -- is required to identify the elements that must be proven and then ask the appropriate questions to find out whether they have or haven't. That has nothing to do with statutes. That's -- that's a judicial function, interpretation of the law, whether it come from common law or statutory, and that's the problem. That's what wasn't done here. We don't know -- we had an allegation of informed consent violation with no questions by which to determine whether they met the elements of that, and whether it's medical malpractice, chiropractic malpractice or sexual assault, frankly, there's elements that need to be proven and shown, and you can't just throw it in under a negligence umbrella.

And those are the comments I'd have to plaintiff's arguments.

THE COURT: I think the real -- the real issue in this case was what caused the stroke. And I think both the state -- I mean, both the plaintiff and the defense put on a strong case as to their theory as to what caused the stroke itself; and, in my opinion, the jury could have went either way. They could have bought the defense theory that it was the meningitis and the -- and the way the spots looked on the spine from some of the -- I don't know which one of those negatives that we were shown, if that was the -- they took that slice of the neck and they look down and find five or six spots, and that theory was, therefore, since it wasn't just one big spot, this was not a stroke that was caused by -- by the adjustment. They could have bought that theory.

They could have bought the theory that the plaintiff, I think, successfully argued and presented that the stroke was caused by the adjustment and that the -- the activities on the 23rd, the second time, was clearly negligent, in their opinion. And that's what they bought.

I think the instructions, if they were in error in any way, were not substantial as to the decision in this case, and your motions are denied.

MS. SCHNEIDER: Thank you.

MR. KOENEN: Thanks, Judge.

(Proceedings concluded at 3:09 p.m.)

STATE OF WISCONSIN)
) ss.
OUTAGAMIE COUNTY)

I, Jeanne L. Spoehr, certify that I am the official court reporter for Branch IV of the Circuit Court of Outagamie County; and as such court reporter, I made full and accurate stenographic notes of the foregoing proceedings; that the same was later reduced to typewritten form; and that the foregoing is a full and accurate transcript of my stenographic notes so taken.

Dated and signed in the City of Appleton on the 5th day of August, 2003.

Jeanne L. Spoehr
Registered Merit Reporter
Certified Realtime Reporter
Outagamie County Justice Center

STATE OF WISCONSIN
SUPREME COURT
APPEAL NO.: 03-1527
Case No.: 00-CV-765

GARY HANNEMANN,

Plaintiff-Respondent-Petitioner,

vs.

CRAIG BOYSON, D.C.

Defendant-Appellant.

ON APPEAL FROM THE CIRCUIT COURT OF OUTAGAMIE COUNTY
THE HONORABLE HAROLD V. FROEHLICH,
CIRCUIT COURT JUDGE, PRESIDING

RESPONSE BRIEF OF DEFENDANT-APPELLANT CRAIG BOYSON, D.C.

HINSHAW & CULBERTSON LLP
Attorneys for Defendant-Appellant
Craig Boyson, D.C.

Thomas R. Schrimpf
State Bar No.: 1018230
Patrick F. Koenen
State Bar No.: 1003209
Jeffrey D. Patza
State Bar No.: 1030512

P.O. ADDRESS:

100 East Wisconsin Avenue
Suite 2600
Milwaukee, WI 53202-4115
414-276-6464

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STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

1. Did the trial court commit prejudicial error when it refused to submit any jury questions on the issue of informed consent after instructing the jury it could find Dr. Craig Boyson negligent for failing to obtain informed consent?

Answered "no" by the trial court.

Answered "yes" by the court of appeals.

STATEMENT OF THE CASE

I. NATURE OF THE CASE.

This lawsuit involves a claim of chiropractic malpractice. The plaintiff-respondent-petitioner, Gary Hannemann, alleges Dr. Craig Boyson caused a neurovascular injury while providing chiropractic care in August of 1997. (R.2; Supp.App., pp.101-103).[1] Dr. Boyson, the defendant-appellant, denies he was negligent or did anything which caused an injury to Hannemann. (R.4). It is Dr. Boyson's contention that Hannemann's injuries were the result of spinal meningitis, a condition which caused his hospitalization in July of 1997. (R.60, Ex.15 and R.62,p.149,l.16-p.151,l.15).

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[1] The abbreviation "Supp.App." stands for the Supplemental Appendix filed herewith by Dr. Boyson.

II. STATEMENT OF FACTS.

Dr. Boyson is a chiropractor who has been practicing since 1978. Between July 22, 1996, and August 23, 1997, he saw Hannemann approximately 40 times for chiropractic treatments to the neck and back. (R.63,p.160,ll.16-25).

Hannemann claims Dr. Boyson initially injured him on Thursday, August 21, 1997, while performing a cervical adjustment. (R.63,p.109,l.24-p.110,l.1). On that date, Hannemann was experiencing back pain and shoulder stiffness. (R.63,p.107,l.22-p.108,l.7). As a result, he made an unscheduled visit to Dr. Boyson's office for treatment. (R.63, p.120,ll.7-15). After describing his symptoms and undergoing an examination, Dr. Boyson delivered a cervical adjustment. (R.63,p.108,l.20-p.111,l.4).

According to Hannemann, the August 21, 1997, adjustment involved Dr. Boyson placing both hands on the side of his face and then rotating or twisting the head until there was a "crack." (R.63,p.109,l.14-p.110,l.8). Hannemann claimed he experienced pain at the time of this adjustment. (R.63,p.109,l.22-p.110,l.1). Immediately after the adjustment, however, Hannemann proceeded to downtown Appleton to join friends for drinks. (R.63,p.111,ll.5-15 and p.113,ll.12-25). At that time, he

was no longer feeling any pain. (R.63,p.114,ll.1-16). Later in the evening, Hannemann returned to his apartment and went to bed. (R.63,p.162,l.19-p.163,l.18). He does not recall experiencing any pain or problems that night and slept well. (R.63,p.163,ll.10-21).

On Friday, August 22, 1997, Hannemann woke up, had a cup of coffee and went to work. (R.63,p.163,l.19-p.164,l.5). During the morning hours, he felt normal and had no physical problems. (p.163,l.19-p.164,l.2). At approximately 1 p.m., however, he noticed his left leg "acting up." (R.63,p.118,ll.8-10). This caused him to call Dr. Boyson's office and schedule an appointment for the next day. (R.63,p.117,l.1-p.118,l.10). After finishing the day's work, Hannemann recalls driving back to downtown Appleton to join his friends for dinner and drinks. (R.63,p.118,l.14-p.119,l.18). Because Hannemann was not feeling well, he did not consume any alcoholic beverages. (R.63,p.165,l.25-p.166,l.17). After leaving his friends, Hannemann returned to his apartment and went to bed. (R.63,p.119,ll.19-23).

On Saturday, August 23, 1997, Hannemann woke up, took a shower and drove to Dr. Boyson's office at approximately 10 a.m. (R.63,p.119,l.24-p.120,l.10). He recalls answering Dr. Boyson's questions regarding his left leg

problem and undergoing reflex testing. (R.63,p.120,l.14-p.121,l.3). He also recalls Dr. Boyson adjusting his neck in the same manner as it was done on August 21, 1997. (R.63,p.121,l.24-p.122,l.17). After the adjustment, Hannemann left Dr. Boyson's office and cannot recall what he did the rest of the day. (R.63,p.123,ll.14-17). He does recall, however, his left leg continued to "tingle" and felt "different." (R.63,p.123,ll.18-21).

On Saturday night, Hannemann again went out with friends to downtown Appleton for dinner and drinks. (R.63,p.168,l.17-p.170,l.23). As the night went on, he recalls his left leg became progressively worse. (R.63,p.123,l.22-p.124,l.2). As a result, he decided to leave his friends and walk back to his apartment at approximately 10:30 p.m. (R.63,p.123,l.22-p.124,l.8 and p.170,l.14-p.171,l.10).

At approximately 3 a.m. on Sunday, August 24, 1997, Hannemann recalls waking up to go to the bathroom. (R.63,p.124,l.11-23). At that time, he felt "paralyzed" and could not move his left side extremities. (R.63,p.124,l.11-p.125,l.8). As a result, he called his wife to pick him up and transport him to the emergency room at the Appleton Medical Center. (R.63,p.125,ll.6-20). After two separate visits to the emergency room, doctors

determined Hannemann's paralysis was caused by small, non-hemorrhagic infarcts along Hannemann's brain stem. He was then admitted for further evaluation and treatment at the Appleton Medical Center.

Hannemann was discharged from the Appleton Medical Center on September 2, 1997, and his follow-up care was handled by Dr. Scott G. Powley, a physiatrist. (R.63,p.128,ll.14-18). At trial, Dr. Powley explained that Hannemann's condition improved significantly within a short period of time. (R.60,Ex.20,p.30,ll.21-24). Within days, Hannemann's left arm problems resolved. (R.60,Ex.20,p.14,ll.10-18). Furthermore, Hannemann never demonstrated any problems with speech, memory or cognitive functioning. (R.60,Ex.20,p.26, l.15-p.28,l.9). Hannemann was able to walk, drive and live on his own within two weeks of discharge. (R.63,p.131,l.12-p.132,l.2). He was also able to return to his job within ten weeks. (R.63,p.131,ll.7-11). Although Hannemann's left leg continued to be weak, he did not need a cane, brace or other medical appliance to assist with ambulation. (R.60,Ex.20,p.45,ll.16-25). Hannemann also does not need any medications, and has not required any medical care since February of 1999. (R.60,Ex.20,p.45,ll.16-25 and p.43,l.4-p.44,l.3). There are no medical restrictions on

Hannemann's activities, with the exception of fast running. (R.60,Ex.20,p.44,ll.4-11). Dr. Powley also does not feel Hannemann's problems will worsen into the future. (R.60,Ex.20,p.45,ll.3-15).

At trial, Dr. Boyson disputed Hannemann's description of the chiropractic treatment provided. Specifically, he denied forcefully twisting or rotating Hannemann's head during the August 21, 1997, adjustment. (R.64,p.38,l.15-p.40,l.3). He also denies Hannemann reporting pain immediately after the adjustment. (R.64,p.42,ll.10-25). Furthermore, Dr. Boyson strenuously denied he performed an adjustment to Hannemann's neck on August 23, 1997. (R.64,p.50,ll.12-18). Rather, he recalls thoroughly examining Hannemann, gently stretching muscles in his neck and then advising him to immediately go to an emergency room for evaluation. (R.64,p.50,ll.14-15 and R.64,p.50,ll.22-p.51,l.12).

It is also important to note that Dr. Boyson's records reflect he obtained Hannemann's informed consent prior to administering chiropractic adjustments. During the initial office visit on July 22, 1996, Dr. Boyson explained the chiropractic treatments he planned to perform, including commonly understood risks and benefits. (R.64,p.20,l.23-p.21,l.13; and R.64,p.22,l.21-p.23,l.9). This discussion

was documented in Dr. Boyson's chart on July 22, 1996. (R.64,p.24,ll.8-14 and R.59,Ex.3,p.0008,Supp.App.104). In addition, on July 22, 1996, and November 26, 1996, Hannemann signed two separate forms confirming Dr. Boyson explained the chiropractic care he would provide. (R.60,Ex.19,p.2 and R.60,Ex.1,p.2; Supp.App.105-108). These forms also included a statement that the "advantage and possible complications" of the treatments were discussed. (Id.). Dr. Boyson admitted he did not specifically discuss the reported risk of a neurovascular injury, because he understood that risk to be "astronomical" and based on research which was "controversial." (R.62,p.117,ll.9-24 and R.62,p.121,ll.11-15; Supp.App.109-110; and R.64,p.23,l.18-p.24,l.7).

It is also important to understand that Hannemann was hospitalized on two occasions for spinal meningitis shortly before the August 21 and August 23, 1997, treatments. The medical history reflects Hannemann was experiencing severe fatigue, malaise, recurrent high temperatures, anorexia, bi-temporal headaches and neck stiffness for several weeks in late June and early July of 1997. (R.60,Ex.11). These symptoms caused Hannemann to go to the emergency room at the Appleton Medical Center on June 30, 1997, for evaluation. (R.62,p.145,l.1-p.146,l.5). Three days later,

he reported continuing problems to his family physician, Dr. Richard Haight. (R.60,Ex.12). On July 2, 1997, Dr. Haight ordered a CT scan of Hannemann's brain, and on July 2, 1997, was admitted to the Appleton Medical Center. (R.60,Ex.12). During this four-day hospitalization, Hannemann underwent a spinal tap and was evaluated by Dr. David Brooks, an infectious disease specialist. (Id.). Dr. Brooks ultimately diagnosed Hannemann with spinal meningitis. (R.60,Ex.14,p.0034-0035 and Ex.15).

After discharge from the Appleton Medical Center, Hannemann continued to report "severe" headaches to Dr. Boyson on August 7, 11, 18 and 21, 1997. (R.60,Ex.16,p.0030-0031). Dr. Ken Viste, a neurologist, testified that Hannemann's neurological problems were probably the result of inflamed brain tissue caused by the meningitis, and not the cervical adjustments. (R.64,p.49,l.23-p.50,l.11 and R.64,p.186,l.2-p.188,l.12).

III. PROCEDURAL HISTORY.

Hannemann commenced this lawsuit on August 21, 2000. (R.1 and 2). In the Complaint, he alleged Dr. Boyson negligently provided chiropractic treatment from August 7 to August 23, 1997. (R.2, Supp.App.102,¶5). He also alleged these negligent treatments caused a permanent injury. (Id.). Dr. Boyson denied all allegations of

causal negligence in an Answer filed on August 31, 2000. (R.4). This matter ultimately proceeded to a jury trial on February 17, 2003.

At trial, Hannemann argued Dr. Boyson was negligent in two respects. First, he deviated from the standard of care in the way he performed the cervical adjustments on August 21 and August 23, 1997. (R.62,p.79,ll.2-19 and R.66,p.69,l.12-p.77,l.2). In support of this argument, Hannemann presented expert testimony from Dr. Kenneth S.J. Murkowski, a Michigan chiropractor. Dr. Murkowski testified that Dr. Boyson was negligent for failing to conduct proper tests and x-rays prior to administering the adjustments in August of 1997. (R.60,Ex.23,p.12,l.14-p.20,l.17). Hannemann also presented evidence suggesting Dr. Boyson was negligent for performing a cervical spine adjustment on August 23, 1997, after he began demonstrating neurological symptoms. (R.64,p.114,l.20-p.117,l.8).

The second basis for criticizing Dr. Boyson related to his failure to inform Hannemann of the reported risks of neurological injuries following cervical adjustments. This criticism was initially suggested in *voir dire* when the jury was asked if they thought it was wrong to expect a doctor to inform a patient of the risks associated with a procedure. (R.62,p.40,l.11-p.41,l.13). The theme was

further developed in opening statement when Hannemann's attorney argued:

> Mr. Hannemann should have been told—he should have been told on the 21st what he was getting into, but he—when he went back into that office on Saturday morning, the 23rd, with those symptoms, this adjustment never should have been given, and Dr. Boyson had an obligation to tell Gary the risk that he was taking.

(R.62,p.91,l.25-p.92,l.6).

During the adverse examination of Dr. Boyson, plaintiff's counsel pointed out that Hannemann was not told about the risks of a neurological injury following a neck adjustment. (R.62,p.121,l.11-16 and R.62,p.129,ll.19-24). Immediately after this point was made, Dr. Murkowski testified that Dr. Boyson was negligent for failing to discuss the risks of a neurovascular injury following an adjustment. (R.60,Ex.23.,p.20,l.18-p.21,l.2). Dr. Murkowski also testified that the reported risk of a neurovascular injury following a cervical adjustment is anywhere between 1 in 1 million, to 55 out of 177 procedures. (R.60,Ex.23,p.24,l.20-p.25,l.5). Subsequently, Hannemann's attorney introduced § Chir 11.02(5) of the Wisconsin Administrative Code (R.60,Ex.30,Supp.App.111), which requires chiropractors to document the procurement of informed consent in a patient's records. All of this evidence was then referred to in a

closing argument when plaintiff's counsel urged the jury to find Dr. Boyson negligent for not obtaining Hannemann's informed consent prior to the August 21 and August 23, 1997, procedures. (R.66,p.71,l.19-p.74,l.10).

Dr. Boyson responded to Hannemann's claims by introducing the testimony of Dr. Jeffrey Wilder, a Madison chiropractor. Dr. Wilder testified that Dr. Boyson's treatments on August 21 and August 23, 1997, were appropriate and within the standard of care. (R.64,p.91,l.10-p.92,l.16). He also explained there are no reliable tests or examinations a chiropractor can perform to determine if a patient is susceptible to a neurovascular injury during a cervical adjustment. (R.64,p.83,l.8-p.85,l.14). As a result, Dr. Boyson was not negligent for failing to perform such an examination. (R.64,p.94,l.21-p.95,l.3).

Dr. Wilder also testified that Dr. Boyson complied with all informed consent requirements when he obtained Hannemann's written permission to perform adjustments. (R.64,p.85,l.23). He explained that the claimed relationship between neurovascular injuries and cervical adjustments in 1996 and 1997 was a controversial subject. (R.64,p.87,l.21-p.88,l.12 and R.64,p.96,ll.4-8). He also stated that the reported incidents of neurological injuries

following cervical adjustments was exceedingly rare and on the order of 1 in 5 million to 1 in 6 million procedures. (R.64,p.87,ll.4-11). Under these circumstances, Dr. Boyson was justified in not discussing this risk with Hannemann. (R.64,p.86,l.24-p.88,l.22).

The defense also presented expert testimony explaining that Hannemann's brain stem infarcts were unrelated to chiropractic care. Specifically, Dr. Kenneth Viste, a neurologist, and Dr. Victor Haughton, a neuroradiologist, testified that Hannemann's vertebral arteries showed absolutely no sign of a traumatic dissection. (R.64,p.187,l.12-p.188,l.12 and R.64,p.138,l.20-p.139,l.1)). Furthermore, the pattern and location of Hannemann's infarcts were inconsistent with a traumatic injury. (R.64,p.197,l.15-p.199,l.16; R.64,p.139,ll.7-8; and R.64,p.143,l.22-p.144,l.12). In their opinion, Hannemann's problems were probably the result of brain inflammation caused by recent spinal meningitis. (R.64,p.187,l.12-p.191,l.6 and R.64,p.159,l.19-p.160,l.8). They do not believe Hannemann's injuries were caused by chiropractic adjustments. (R.64,p.198,l.25-p.199,l.168 and R.64,p.138,l.12-p.139,l.1).

Following the presentation of evidence, the court conducted the required jury instruction conference. At

that time, defense counsel asked the court to rule, as a matter of law, that Dr. Boyson satisfied any legal obligations he owed to obtain informed consent. (R.66,p.5,l.15-p.11,l.5 and p.37,l.20-p.39,l.19; Supp.App.112-118 and Supp.App.127-129). The basis for this request was: (1) Dr. Boyson did obtain written informed consent from Hannemann in compliance with § Chir 11.02(5) of the Wisconsin Administrative Code (R.60,Ex.30; Supp.App.111); and (2) the law does not require the disclosure of risks which are "astronomical." (R.66,p.5,l.15-p.8,l.23; Supp.App.112-115). This request was rejected by the court without explanation. (R.66,p.11,ll.2-5; Supp.App.118).

In reaction to the court's decision to permit the issue of informed consent to go before the jury, Dr. Boyson requested the informed consent instruction in Wis. J.I.-Civil 1023.2. (R.66,p.33,ll.18-21; Supp.App.124 and Supp.App.145-149). In particular, Dr. Boyson requested the last paragraph of Wis. J.I.-Civil 1023.2 to be read to the jury, because it defined limits and exceptions to Dr. Boyson's duty to disclose information about risks. (Id.) Before the court even considered Dr. Boyson's position, the request was denied. (R.66,p.33,l.22-p.35,l.12; Supp.App.124-126 and A.Ap.145-146). Instead, the court

provided its own modified version of Wis.-J.I. Civil 1023.2 with the last paragraph deleted. (R.66,p.54,l.11-p.55,l.8;R.47-13; Supp.App.133-135 and Supp.App.152-153).

Dr. Boyson also made a request that the informed consent questions in Wis. J.I.-Civil 1023.1 be included in the special verdict. (R.66,p.34,ll.22-24 and R.66,p.37,l.19-p.40,l.8; Supp.App.125, Supp.App.138-144; and Supp.App.127-130). These questions were required because negligence in treatment (covered by 1023.8) is different than negligence for failing to disclose information (covered by 1023.2) and could not be determined using a single negligence question. (R.66,p.137,l.20-p.140,l.18). In addition, the jury also had to determine whether a reasonable patient would have refused the treatment even if information regarding risks was disclosed. (R.66,p.54,l.17-p.55,l.1 and p.37,l.19-p.42,l.8; Supp.App.134-135 and Supp.App.127-132). After significant discussion, and an admission of confusion by the court, the requested verdict questions were rejected in the following statement:

> We are not going to mess with the verdict. Let the appellate court straighten this mess out, if it leads to it.

(R.66,p.42,ll.9-11; Supp.App.132). The court then submitted a special verdict form with only a single

question addressing Dr. Boyson's negligence. (R.48, Supp.App.154-155).

Dr. Boyson also requested the court give the portion of Wis.-J.I. Civil 1023.8 which instructed the jury to separate out injuries caused by the chiropractic treatment from those caused by the meningitis when answering the cause and damage questions. The court refused this request. (R.66,p.28,l.11-p.29,l.6 and R.66,p.32,l.12-p.33,l.9; Supp.App.119-120 and Supp.App.123-124). Instead, the court substituted the standard cause instruction in Wis. J.I.-Civil 1500. (R.66,p.32,l.4-p.33,l.9; Supp.App. 123-124 and R. 66, p. 56, ll.13-23).

After closing arguments, the jury returned a verdict in favor of Hannemann. It found Dr. Boyson was negligent with respect to his care and treatment of Hannemann, and the negligence was a cause of his neurovascular injury. (R.48; Supp.App.154). It also awarded Hannemann damages in the total amount of $227,000.00. (R.48; Supp.App.155).

On March 10, 2003, Dr. Boyson filed a motion requesting a new trial pursuant to Wis. Stat. § 805.15. (R.50,51,52). The basis for the motion was that the trial court committed prejudicial error by permitting the issue of informed consent to be decided by the jury without submitting the special verdict questions contained in Wis.

J.I.-Civil 1023.1. (R.51). The motion was further based upon the fact that the jury instruction on informed consent was erroneous, because it did not contain the last paragraph of Wis. J.I.-Civil 1023.2 which defines the limits and exceptions to the duty to disclose information. (R.51).

On April 4, 2003, the court conducted a hearing on the Dr. Boyson's motion. (R.67; Supp.App.156-180). After listening to arguments, the court denied the motion in a one-page statement from the bench. (R.67,p.23,l.1-p.24,l.1; Supp.App.178-179). A majority of the court's decision addressed a point which was not relevant to the motion (i.e., whether the jury believed Hannemann's injury was caused by an adjustment or meningitis). The court's only reference to the issues raised by the motion was the following sentence:

> I think the instructions, if they were in error in any way, were not substantial as to the decision in this case, and your motions are denied.

(R.67,p.23,l.22-p.24,l.1; Supp.App.178).

On May 2, 2003, the court entered an order denying the motion for a new trial. (R.56; Supp.App.181). On May 2, 2003, a judgment was entered against Dr. Boyson for $231,378.16, plus interest. (R.56,Supp.App.181). Dr.

Boyson filed a notice of appeal from the trial court's judgment on June 5, 2003. (R.58)

On April 13, 2004, the Wisconsin Court of Appeals ruled that the trial court committed error by not providing a special verdict form which had separate questions as to negligent treatment and failure to obtain informed consent. Hannemann v. Boyson, 2004 WI App 96, ¶¶ 19-24. Specifically, the court held that Wis. J.I.-Civil 1023.1 applies to cases where chiropractors are accused of failing to obtain informed consent. Hannemann, 2004 WI App 96 at ¶¶ 20-21.

The court began it analysis by stating that the legal theories of informed consent are identical, whether applied to doctors or to chiropractors. Id. at ¶ 20. Likewise, the court noted that the principles behind the legal theories of the informed consent requirement, the individual's right to self-determination and the right to refuse treatment, are also identical when applied to persons seeking treatment from doctors or chiropractors. Id. Specifically, the court stated:

> This principle of self-determination has been extended to the doctrine of informed consent: "Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent, commits an assault, for which he is liable in damages."

> Id. (quoting Scholendorff v. Society of New York Hosp., 105 N.E. 92-93 (1914)). Our supreme court has recognized that the right to liberty under the state constitution "includes an individual's choice of whether or not to accept medical treatment." L.W., 167 Wis.2d at 69. These principles underlying the doctrine of medical informed consent apply with equal force to the doctrine of chiropractic informed consent.

Hannemann, 2004 WI App 96 at ¶ 21.

In addition, the court recognized the substantial similarities between doctors and chiropractors that render the informed consent requirement applicable to both. For example, the court acknowledged that the Wisconsin Supreme Court has held that both medical doctors and chiropractors are "health care providers." Id. at ¶ 21 (citing Arenz v. Bronston, 224 Wis.2d 507, 515-16, 592 N.W.2d 295 (1999)). The court also noted that both doctors and chiropractors "are involved in the diagnosis, treatment or care of patients and both are licensed by state examining boards." Id. Due to these significant similarities, the court held that "Wis. J.I.-Civil 1023.1 is a model for chiropractic negligence as well as medical informed consent." Id.

Having concluded that Wis. J.I.-Civil 1023.1 applies to failure to obtained informed consent claims against chiropractors, the court addressed whether the trial court's failure to use the special verdict for Hannemann's informed consent claim against Dr. Boyson was prejudicial

error that required a new trial. The court answered this question in the affirmative. The court began this analysis by recognizing that the special verdict must cover material issues of ultimate fact. Id. at ¶ 22. The court relied upon Wis. Stat. § 805.12(1) for the correct conclusion that a special verdict which does not cover all material issues of ultimate fact is defective. Id. The court then set forth the three elements Hannemann needed to establish for his informed consent claim: "(1) that he was not informed of the risks; (2) that he would not have undergone the treatment had he known of the risks, and (3) the procedure caused the injury." Id. The court realized that the jury in this case was not asked to determine whether Hannemann had established all three elements of his informed consent claim. Id. According to the court, the jury in this case only answered whether "'Dr. Craig Boyson [was] negligent with respect to his care and treatment of Gary Hannemann in August of 1997.' The jury answered 'yes.'" Id. (quotations omitted). As a result, the court held that "the verdict questions did not cover the material issues of ultimate fact necessary to prove Boyson failed to obtain Hannemann's informed consent." Id.

The court rejected Hannemann's argument that the trial court's failure to submit informed consent verdict

questions was harmless error. The court set forth the correct standard for harmless error which is "whether there is a reasonable possibility that the error contributed to the outcome of the action or proceeding at issue." Id. at ¶ 23 (citing State v. Dyess, 124 Wis. 2d 525, 543, 370 N.W.2d 222 (1985)). The court stated that "[a] reasonable possibility of a different outcome is a possibility sufficient to "'undermine confidence in the outcome.'" Id. (quotations omitted). Applying this standard, the court held that its confidence in the outcome of the verdict in this case is undermined "because we do not know whether the jury would have found that all three elements [of Hannemann's informed consent claim] were present." Id. at ¶ 24. Moreover, the court recognized that there is no way to know whether the jury found Dr. Boyson guilty of negligent treatment or failure to obtain informed consent. Id. As a result, the court concluded that "it is reasonably possible the error affected the jury's determination." Id. Accordingly, the court held that the trial court's failure to use *Wis. J.I.-Civil 1023.1 was not harmless error and required a new trial. Id.

Subsequent to the decision of the Wisconsin Court of Appeals, Hannemann petitioned the Wisconsin Supreme Court, pursuant to Wis. Stat. §§ 808.10 and 809.62, to review the

court of appeal's decision claiming the court issued the decision inconsistent with prior precedent. This court granted the petition for review on September 16, 2004.

ARGUMENT

The court of appeals correctly reversed the part of the trial court decision denying Dr. Boyson's motion for a new trial. Specifically, the court of appeals was right to conclude that the trial court's failure to submit the informed consent verdict form to the jury was an error that required a new trial. As the court of appeals properly recognized, there is nothing in Wisconsin law which precludes the use of the informed consent verdict form to be used in chiropractic cases. Moreover, it is completely consistent with both the legal theory and the public policy behind the informed consent requirement for the verdict form to be used in chiropractic cases. This court should therefore affirm the court of appeals' decision.

I. THE COURT OF APPEALS CORRECTLY HELD THAT THE TRIAL COURT ERRED IN NOT USING THE INFORMED CONSENT VERDICT FORM IN WIS JI - CIVIL 1023.1.

Hannemann argues that the special verdict form for informed consent does not apply to chiropractors. (Hannemann Br. at 11-17). Hannemann is wrong. While there are some differences between chiropractors and medical doctors, it does not follow that the essential elements of

a failure to obtain informed consent claim against a chiropractor should be eliminated. In fact, it is the significant similarities between doctors and chiropractors that render the informed consent requirement applicable to both professions. Contrary to Hannemann's contentions, there is nothing in Wisconsin law that even suggests that the requirement for informed consent does not apply equally to both. Indeed, the legal theory and public policy behind the doctrine of informed consent apply equally to medical doctors and to chiropractors.

A. The Legal Theory And Public Policy Behind The Informed Consent Requirement Apply Equally To Medical Doctors And To Chiropractors.

In reaching its conclusion that Wis. J.I.-Civil 1023.1 applies to chiropractors and should have been given to the jury in this case, the court of appeals held that "the legal theories of informed consent for medical doctors and for chiropractors are the same" and that "the principles behind the theories are identical." Hannemann, 2004 WI App 96 at ¶ 20. As explained below, the court of appeals is exactly right.

The legal duty to obtain informed consent based upon the negligence theory of liability was first recognized in the common law of Wisconsin. Specifically, the Wisconsin Supreme Court first recognized a negligence action for

failure to obtain informed consent in Trogun v. Fruchtman, 58 Wis. 2d 569, 207 N.W.2d 297 (1973). See Law Note to Wis. J.I.-Civil 1023.1 at 2. The standard set forth in Trogun was later followed by the Wisconsin Supreme Court in Scaria v. St. Paul Fire & Marine Ins. Co., 68 Wis. 2d 1, 227 N.W.2d 647 (1975). See id. The standard set forth in Scaria was then codified in Wis. Stat. § 448.30. See id. Thus, the basis for the informed consent requirement is grounded in the common law of Wisconsin.

As stated above, the court of appeals in this case recognized the common law origins of the informed consent doctrine and provided a detailed history behind the requirement of informed consent. The court began by recognizing that an individual's right to self-determination, including the right to refuse treatment, is one of the most sacred and guarded rights in the common law. Hannemann, 2004 WI App 96 at ¶ 20. As a result, the court held that informed consent requirement applied equally to doctors and to chiropractors. Specifically, the court stated:

> This principle of self-determination has been extended to the doctrine of informed consent: "Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent, commits an assault, for which he is liable in damages."

> Id. (quoting Scholendorff v. Society of New York Hosp., 105 N.E. 92-93 (1914)). Our supreme court has recognized that the right to liberty under the state constitution "includes an individual's choice of whether or not to accept medical treatment." L.W., 167 Wis.2d at 69. These principles underlying the doctrine of medical informed consent apply with equal force to the doctrine of chiropractic informed consent.

Hannemann, 2004 WI App 96 at ¶ 21.

Because the basis for all informed consent claims grows out of the same historical concerns and the same commmon law, all claims, whether against chiropractors or medical doctors, should have the same basic proof requirements. To treat these claims completely different, as Hannemann urges here, has no legal or historic justification.

While it is obvious there are some differences between chiropractors and medical doctors in the types of medical treatment each provides, these differences should not be used to support an argument that a plaintiff can be relieved from proving all of the elements of an informed consent claim simply because it involves a chiropractor.

Indeed, there are far more similarities than differences between medical doctors and chiropractors, especially for the application of the informed consent requirement. As the court of appeals noted, both medical doctors and chiropractors are "health care providers" under

Wisconsin law Hannemann, 2004 WI App 96 at ¶ 21 (citing Arenz v. Bronston, 224 Wis.2d 507, 515-16, 592 N.W.2d 295 (1999)). The court also stated that "[b]oth doctors and chiropractors are involved in the diagnosis, treatment or care of patients and both are licensed by state examining boards." Id. Consquently, the law requires both doctors and chiropractors to obtain informed consent before providing medical care, administering treatment and performing procedures. To treat these health care providers so disparately, simply because they utilize different approaches, would be unfair and without support in the law.

B. The Wisconsin Legislature And Wisconsin Appellate Courts Have Not Distinguished The Practice of Medicine With The Practice Of Chiropractic With Respect To The Requirement Of Informed Consent.

Hannemann begins by arguing that Wisconsin appellate courts "have deliberately distingushed the practice of medicine from the practice of chiropractic." (Hannemann Br. at 12). In support of this statement, Hanneman relies upon Kerkman v. Hintz, 142 Wis. 2d 404, 418 N.W.2d 795 (1988). (Id.). Hannemann's reliance upon Kerkman is misplaced. Although the court in Kerkman properly recognized the differences between doctors and chiropractors, there is nothing in that case to even

suggest that the historical concerns supporting informed consent do not apply to chiropractors.

Next, Hannemann points out that the requirements for medical and chiropractic licensure are distinct. (Hanneman Br. at 12). Hannemann fails to explain why this fact means that the requirement of obtaining informed consent does not apply equally to medical doctors and chiropractors.

Hannemann also tries to argue that the fact that there are different sources for the informed consent requirement for medical doctors and chiropractors, Wis. Stat. § 448.30 and Wis. Admin. Code § Chir. 11.02(5), somehow means that the special verdict form found in Wis. J.I.-Civil 1023.1 does not apply to chiropractors. (Hannemann Br. at 13-14). Hannemann is wrong. This argument fails because, as stated above, the informed consent requirement was first recognized in Wisconsin common law based upon historical concern of the right of self-determination. Moreover, there is nothing in either Wis. Stat. § 448.30 or Wis. Admin. Code § Chir. 11.02(5) to even suggest that Wis. J.I.-Civil 1023.1 does not apply to chiropractors.

Hannemann also argues that the verdict questions suggested in Wis. J.I. Civil 1023.1 apply only to medical, and not chiropractic, malpractice cases, relying upon Murphy v. Nordhagen, 222 Wis.2d 574, 588 N.W.2d 96 (1998)

to support this argument. (Hannemann Br. at 14-15). As the court of appeals in this case correctly concluded, Hannemann's reliance upon Murphy is misplaced for numerous reasons.

The Murphy case involved a plaintiff who received chiropractic adjustments for low back pain over a two month period of time in 1993. 222 Wis. 2d at 576-577. Unfortunately, the plaintiff's symptoms continued and she was subsequently seen by a medical doctor who diagnosed a herniated disk and performed surgery to remove it. Murphy, 222 Wis. 2d at 577-579. Following the surgery, the plaintiff sued the chiropractor alleging he failed to: (1) diagnose a herniated disk and refer her to a medical doctor; and (2) obtain informed consent. Id. at 576. The chiropractor denied these allegations and moved for a dismissal of the complaint on the grounds Wisconsin law did not require chiropractors to make referrals or obtain informed consent. Id. The trial court granted the motion for summary judgment and was affirmed on appeal. Id.

In Murphy, the court of appeals briefly addressed the applicability of Wisconsin's informed consent laws to chiropractors. Specifically, the court stated these laws were "facially inapplicable" to a chiropractic negligence case. Murphy, 222 Wis.2d at 584. There was no explanation

given for this statement, other than a reference to Wis. Stat. § 448.30 (the informed consent statute for medical doctors), which mentions "physicians" and not "chiropractors." Presumably, the court felt the statute's lack of any reference to chiropractors made it "facially inapplicable." No further explanation was provided.

As discussed in detail below, the court of appeals' brief discussion of informed consent does not control the outcome of this case.

To begin with, Murphy is easily distinguished from this case. The plaintiff's claim in Murphy involved a "failure to refer" allegation. By contrast, this case involves a claim that Dr. Boyson directly injured Hannemann with a chiropractic adjustment. In light of the fact Wisconsin law does not require chiropractors to make referrals to medical doctors (See Kerkman v. Hintz, 142 Wis.2d 404, 420-21, 418 N.W.2d 795 (1998)), it follows there would be no duty to explain the availability of alternative modes of medical treatment consistent with informed consent laws. On the other hand, explaining the risks of a complication directly following a chiropractic treatment would be consistent with informed consent law. There is no reason to assume that just because the Murphy

court found no duty to obtain informed consent in a failure to refer, it would reach the same decision in this case.

More importantly, the decision in Murphy was reached *before* the Wisconsin Adminsitrative Code explicitly required chiropractors to obtain informed consent. Although the informed consent requirement is long-standing in Wisconsin common law, the court in Murphy essentially ignored the common law and relied solely upon Wis. Stat. § 448.30 to support its decision. As the court of appeals in this case properly recognized, the treatment at issue in Murphy occurred in 1993, three years *before* the creation of Wis. Admin. Code § Chir. 11.02(5). Perhaps the exisitence of *Wis. Admin. Code § Chir. 11.02(5) would have changed the result in Murphy. Regardless, the existence of Wis. Admin. Code § Chir. 11.02(5) renders the decision in Murphy, that Wisconsin's informed consent laws are "facially inapplicable" to chiropractic cases, as inapplicable to this case.

Finally, it would be totally inconsistent and unfair for Hannemann to introduce Wis. Admin. Code § Chir. 11.02(5) and argue throughout the trial that Dr. Boyson had a duty to obtain informed consent, and then assert Wisconsin's informed consent laws do not apply. The elements of an informed consent claim, whether it is made

against a medical doctor or chiropractor, are the same. It would be completely unjust to argue that a defendant can be liable for failing to obtain informed consent, and then not require proof of all of its essential elements.

The trial court should not have rejected Dr. Boyson's request for verdict questions on the issue of informed consent. This was a prejudicial error which requires a new trial.

C. For Both Medical Doctors And Chiropractors, The Concepts Of "Negligence In Treatment" And "Negligence For Failing To Obtain Informed Consent" Are Separate And Distinct.

Hannemann defends the trial court's failure to utilize the special verdict form for informed consent in this case by claiming that, for chiropractors, "negligence in failing to obtain informed consent is legally indistinct from negligence in the provision of diagnosis and treatment of a patient." (Hannemann Br. at 16). This argument is without merit.

The concepts of "negligence in treatment" and "negligence for failing to obtain informed consent" are separate and distinct. Johnson v. Kokemoor, 199 Wis.2d 615, 629, n.16, 545 N.W.2d 495 (1996). A doctor is negligent in treatment when there is a diagnosis or therapeutic care which deviates from applicable standards.

Wis. J.I. Civil 1023 and Wis. J.I. Civil 1023.8. A doctor is negligent for failing to obtain informed consent when there is a failure to disclose information about the risks of a procedure which a reasonable patient would want to know. Wis. J.I. Civil 1023.2. A doctor can be found negligent for failing to obtain informed consent even in situations where the diagnosis and treatment provided were flawless. Trogun v. Frutchman, 58 Wis. 2d 569, 599, 207 N.W.2d 297 (1973) and Scaria v. St. Paul Fire & Marine Ins. Co. , 68 Wis. 2d 1, 12, 227 N.W.2d 467 (1975). The two concepts are not interchangeable.

A review of the historical development of the informed consent requirement in malpractice cases reveals why it is different from negligence in treatment. Prior to 1973, a physician's liability to a patient for failing to obtain informed consent was based on the tort of "battery." Johnson, 199 Wis.2d at 628-629. The rationale for treating it this way was the thought that every person had a right to make decisions about what should be done to his or her body, and no physician had permission to interfere with that right by failing to provide the information necessary to make intelligent choices. Martin v. Richards, 192 Wis. 2d 156, 169-170, 531 N.W.2d 70 (1993). Under the pre-1973 law, a physician who performed a procedure without

permission, or without explaining its risks, committed a "battery." Trogun, 58 Wis. 2d at 596-599.

In 1973, the Wisconsin Supreme Court in Trogun determined the failure to obtain informed consent was more properly classified as "negligence" than "battery." The court explained the "anti-social nature" of battery did not fit well in the typical physician-patient relationship. Trogun, 58 Wis.2d at 599. As a result, the failure to obtain informed consent in malpractice cases became recognized as a form of negligence.

The fact Wisconsin courts now classify the failure to obtain informed consent as a form of negligence does not mean it is the same as negligence in treatment. To the contrary, cases after Trogun make it quite clear the two concepts are fundamentally different. In Johnson, the Supreme Court said:

> Although an action alleging a physician's failure to adequately inform a patient is grounded in negligence, it is distinct from the negligence triggered by a physician's failure to provide treatment consistent with the applicable standard of care. The doctrine of informed consent focuses upon the reasonableness of the physician's disclosures to a patient rather than the reasonableness of a physician's treatment of that patient.

199 Wis. 2d at 630, n.16.

In Finley v. Culligan, 201 Wis. 2d 611, 548 N.W.2d 854 (Ct. App. 1996), the court of appeals specifically declined to treat negligence in treatment the same as negligence for failure to obtain informed consent and stated:

> A failure to diagnose is one form of medical malpractice. See Wis. J .I. Civil 1023 . . . a failure to obtain informed consent is another discrete form of malpractice, requiring a consideration of additional and different factors. See Wis. J.I. Civil 1023.2.

Finley, 201 Wis. 2d at 628.

In light of this case law, it was clearly erroneous for the trial court to try and resolve both claims with one jury question. This simply is not possible, because the essential elements of an informed consent claim are different than a claim based on negligent treatment. To succeed on a informed consent claim, a plaintiff must establish: (1) the patient was not told of treatment risks and alternatives; (2) a reasonable patient would have refused treatment or chosen an alternative if he or she had been adequately informed; and (3) the failure to disclose information was a cause of the patient's injuries. Fischer v. Wisconsin Patients Compensation Fund, 2002 WI App 192, ¶ 8, 256 Wis. 2d 848, 650 N.W.2d 75, 78 (citing Martin v. Richards, 192 Wis. 2d 156, 531 N.W.2d 70 (1995)). If these

elements are not established, a claim based on informed consent must fail.

Because the trial court never asked these fundamental questions in the special verdict, it is impossible to know if any of the essential elements of Hannemann's informed consent claim were proven. Consequently, the trial court erred by not utilizing the special verdict form for informed consent in this case.

II. THE COURT OF APPEALS CORRECTLY DETERMINED THAT THE TRIAL COURT'S ERROR IN NOT SUBMITTING A SPECIAL VERDICT ON INFORMED CONSENT WAS NOT HARMLESS ERROR AND THEREFORE REQUIRES A NEW TRIAL.

Hannemann argues that the trial court's error in failing to utilize the special verdict for informed consent in Wis. J.I.-Civil 1023.1 was harmless error. (Hannemann Br. at 17-19). Hannemann is incorrect.

It is well-established in Wisconsin that "a new trial shall not be granted for an error unless the error has affected the substantial rights of a party." Martindale v. Ripp, 2001 WI 113, ¶31, 246 Wis. 2d 67, 629 N.W.2d 698 (citing Wis. Stat. § 805.18(2)). In other words, the error must not be harmless. As the court of appeals in this case correctly stated, the standard for harmless error is whether there is a reasonable possibility that the error contributed to the outcome of the action or proceeding at

issue. State v. Dyess, 124 Wis. 2d 525, 543, 370 N.W.2d 322 (1995); Martindale v. Ripp, 2001 WI at ¶32. The reasonable possibility of a different outcome is a possibility sufficient to "undermine confidence in the outcome." Dyess, 124 Wis. 2d at 545; Martindale, 2001 WI 113, at ¶32.

The trial court's decision not to submit verdict questions on informed consent was clearly not harmless error and therefore requires a new trial. In this case, there is a reasonable possibility that the trial court's error in failing to utilize Wis. J.I.-Civil 1023.1 for Hannemann's informed consent claim against Dr. Boyson contributed to the outcome of the trial. Because the court did not ask informed consent questions, it is impossible to know if the jury found Dr. Boyson negligent in his treatment of Hannemann (i.e., by failing to do proper tests or by failing to perform a proper adjustment) or negligent for failing to provide information about the risk of a stroke. It is vitally important to make this determination, because if the jury determined Dr. Boyson was negligent solely for failing to disclose information about a stroke, it then would have had to determine whether this information would have made any difference in the outcome (i.e., would a reasonable patient in Hannemann's

position have refused the treatment if the information had been provided?). Obviously, there is a "reasonable possibility" a jury could have concluded a reasonable patient in Hannemann's position would have gone forward with the adjustment even with information about the remote possibility of a stroke. If this would have occurred, the required element of an informed consent claim would not have been established, and Dr. Boyson would not be liable to Hannemann. The trial court's decision not to submit verdict questions on informed consent was clearly not harmless error for Dr. Boyson, because it deprived him of the "reasonable possibility" of obtaining a defense verdict.

At a minimum, the omission of special verdict questions on the issue of informed consent "undermines confidence" that the outcome in this case is justified. Because it is now impossible for anyone to know why a jury found Dr. Boyson negligent (i.e., was he negligent in his treatment or negligent for failing to disclose information?), it is also impossible to know if Dr. Boyson would have been vindicated if the jury had determined his failure to disclose information regarding the risk of a stroke was not causal of any injury. This uncertainty as to the validity of this verdict requires a new trial under

the standards of Dyess, Martindale and Wis. Stat. § 805.18(2) and in the interests of justice. This court should therefore affirm the ourt of appeals' decision.

CONCLUSION

For the reasons set forth above, Dr. Boyson respectfully requests that this court affirm the court of appeals' decision reversing the trial court's denial of Dr. Boyson's motion for a new trial.

Dated at Milwaukee, Wisconsin, this 8th day of November, 2004.

HINSHAW & CULBERTSON LLP
Attorneys for Defendant-Appellant
Craig Boyson, D.C.

Thomas R. Schrimpf
State Bar No.: 1018230
Patrick F. Koenen
State Bar No. 1003209
Jeffrey D. Patza
State Bar No. 1030512

P. O. ADDRESS:

100 East Wisconsin Avenue
Suite 2600
Milwaukee, WI 53202-4115
414-276-6464

CERTIFICATION

I certify that this brief conforms to the rules contained in sec. 809.19 (8) (b) and (c), Stats., for a brief produced using the following font: Monospaced font: 10 characters per inch; double spaced; 1.5 inch margin on left side and 1 inch margins on the other 3 sides. The length of this brief is 37 pages.

Dated: at Milwaukee, Wisconsin, this 8th day of November, 2004.

HINSHAW & CULBERTSON LLP
Attorneys for Defendant-Appellant
Craig Boyson, D.C.

Thomas R. Schrimpf
State Bar No.: 1018230
Patrick F. Koenen
State Bar No. 1003209
Jeffrey D. Patza
State Bar No. 1030512

P. O. ADDRESS:

100 East Wisconsin Avenue
Suite 2600
Milwaukee, WI 53202-4115
414-276-6464

CERTIFICATION OF MAILING

I certify that this brief and appendix were deposited in the United States mail for delivery to the Clerk of the Court of Appeals by UPS Express mail, on November 8, 2004. I further certify that the brief or appendix was correctly addressed and postage was pre-paid.

Date: November 9, 2004

HINSHAW & CULBERTSON LLP

Thomas R. Schrimpf
State Bar No: 1018230
Jeffrey D. Patza
State Bar No.: 1030512

P. O. Address:
100 East Wisconsin Ave
Suite 2600
Milwaukee, WI 53202
414-276-6464

STATE OF WISCONSIN
SUPREME COURT
APPEAL NO.: 03-1527
Case No.: 00-CV-765

GARY HANNEMANN,

Plaintiff-Respondent-Petitioner,

vs.

CRAIG BOYSON, D.C.

Defendant-Appellant.

**ON APPEAL FROM THE CIRCUIT COURT OF OUTAGAMIE COUNTY
THE HONORABLE HAROLD V. FROEHLICH,
CIRCUIT COURT JUDGE, PRESIDING**

SUPPLEMENTAL APPENDIX OF DEFENDANT-APPELLANT CRAIG BOYSON, D.C.

HINSHAW & CULBERTSON LLP
Attorneys for Defendant-Appellant
Craig Boyson, D.C.

Thomas R. Schrimpf
State Bar No.: 1018230
Patrick F. Koenen
State Bar No.: 1003209
Jeffrey D. Patza
State Bar No.: 1030512

P.O. ADDRESS:

100 East Wisconsin Avenue
Suite 2600
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414-276-6464

DEFENDANT-APPELLANT'S APPENDIX
TABLE OF CONTENTS

STATE OF WISCONSIN CIRCUIT COURT BRANCH IV OUTAGAMIE COUNTY

Gary Hannemann and
Mary Jo Hannemann, his wife,
plaintiffs,

vs.

COMPLAINT
Case No.: 00-CV- 765
Personal Injury - Auto: 30101

Craig Boyson, D.C.,
The ABC Insurance Company,
{Gary's health insurance}
defendants.

OUTAGAMIE COUNTY
FILED
AUG 21 2000
CLERK OF COURTS

1. The plaintiffs, Gary and Mary Jo Hannemann, are husband and wife and residents of Appleton, Outagamie County, Wisconsin.

2. The defendant, Craig Boyson, is a doctor of chiropractic with his principle place of practice in Appleton, Outagamie County, Wisconsin.

3. The defendant, The ABC Insurance Company, is a so-called professional liability insurance company which at all times relevant to the allegations of this complaint had in full force and effect a policy of insurance which provided coverage for all those claims this complaint makes against Craig Boyson, D.C., and it is therefore named as a defendant in this action pursuant to the provisions of Wisconsin law.

4. Blue Cross & Blue Shield United of Wisconsin made payment for

the treatment which was necessary for the injuries suffered as a proximate consequence of the defendant's negligence, as is alleged below, and it is therefore made a party to this action solely for the purpose of asserting any claim for subrogation or other right of reimbursement it might have.

5. From August 7 through August 23, 1997, the defendant negligently provided chiropractic treatment to the plaintiff, Gary Hannemann, as a proximate consequence of which the plaintiff suffered serious and permanent injury, he was unable to undertake his normal activities for a sustained period of time, he was forced to expend substantial sums for his medical care and treatment, and he was otherwise permanently injured and harmed.

6. The plaintiff, Gary Hannemann, was at all times relevant to the allegations of this complaint in the exercise of due and reasonable care for his own safety.

7. As a further direct and proximate consequence of the defendant's negligence, the plaintiff, Mary Jo Hannemann, sustained a loss of her husband's services, society, and consortium.

WHEREFORE, the plaintiffs respectfully request that judgment be entered in their favor, as follows:

1) Against the defendants Craig Boyson, D.C., and the ABC Insurance Company, for such amount of compensatory damages as is deemed appropriate by the trier of fact;

2) Against Blue Cross & Blue Shield United of Wisconsin foreclosing any claim for subrogation or other right of reimbursement for the payment or provision of health care.

3) Against all defendants for attorney fees, costs, and interest to the full extent allowed

pursuant to Wisconsin law.

Dated this 18th day of ~~July~~ August, 2000.

ROBINSON, PETERSON,
BERK & CROSS, LLP

By: _____
John C. Peterson
Attorneys for Plaintiffs
State Bar No.: 1010965

MAILING ADDRESS:
200 East College Avenue
P.O. Box 5159
Appleton, WI 54913-5159
(920) 831-0300

****PLAINTIFFS HEREBY DEMAND A JURY OF TWELVE****

(1)

NAME: Hanneman Gary

DATE	
7-22 96	(O) PC (L) = Pain in (L) Traps & (L) Mid Cerv. MCRC = Same. Resisted ROM (Cervical) + 5 w/ not pain. Bakody ↓ arm Tingling slight. Cost/Clav. (−) LLF = pain in (L) Mid Cervical into mid Traps. 2/4 TT (L) Mid Cerv Fix C-4/C-5 Left − TT (L) Epicondyle.
	(A) Suspect Cervical facet Sublux/Dysfunction creating mild Radicular involvement / Irritation. Possible I.V.D. but not likely
	(P) CMT to Subluxation. Will get X-rays from Dr. Haight Sept. Explained Pain cycle / Increase. Gave Report of findings. (Informed Consent.)
7-23 96	(S) NB Worse − Tingling [illegible] No X-rays of neck.
	(O) C-5 posterior w/ Degen. Changes Spurs MYP. C-5 Bi-lateral fixation
	(P) CMT − [illegible] out of Town till [illegible]. [illegible] posture for driving, Rxercises.
7-30	(S) NB persists.
	(O) ↓ Sensation to medial lateral/anterior lower arm & posterior upper arm. T.P. (L) Inf Sp = ↑ Tingling in (L) arm. Bakody (+) for ↓ NB. C-5 (L) − T-2 anterior

Date 7 / 22 / 96

PATIENT INFORMATION QUESTIONNAIRE

Name HANNEMANN First GARY Middle H.

Address 319 E. HARRIS ST APT. 6 City APPLETON

State WI Zip 54911

Age 44 Date of Birth 5 / 1 / 52 Sex M ☒ F ☐ Marital Status S ☐ M ☒ D ☐ W ☐

SS# 388 - 56 - 7790 Occupation BANKING

Drivers License #

Employer GREEN TREE FINANCIAL CORP. Address 1047 N. LYNNDALE AVE. SUITE 1. APPLETON, WI 54913

Home Phone #(414) 993 - 9123 Work Phone #(414) 731 - 3107

Name of (Spouse) Parents MARY JO Occupation EDUCATOR

(Spouse) Parent Employer APPLETON AREA SCHOOL DIST Work Phone #( ) -

Nearest Relative STEPHEN HANNEMANN Phone #(414) 735 - 0219

**WHO REFERRED YOU TO OUR OFFICE?

What are your primary complaints?

Other doctors seen for these problems:

Date of accident or beginning of illness:

How did it occur?

Have you been treated for any health condition in the last two years? YES ☐ NO ☒

Describe:

Name of Medical Physician: DR. RICHARD HAIGHT

Medications you now take:

How is most of your day spent? SITTING ☐ WALKING ☐ OTHER ☐ DRIVING

EALTH QUESTIONNAIRE: Please check the symptoms you are now experiencing:

MUSCULO-SKELETAL SYSTEM

- X Low Back Problems
- _ Pain Between Shoulders
- __ Neck Problems
- ___ Arm Problems
- ___ Leg Problems
- ___ Swollen Joints
- ___ Painful Joints
- ___ Stiff Joints
- ___ Sore Muscles
- ___ Weak Muscles
- ___ Walking Problems

GENITO-URINARY SYSTEM

- ___ Bladder Trouble
- ___ Excessive Urination
- ___ Scanty Urination
- ___ Painful Urination
- ___ Discolored Urine
- ___ Prostate (Men)
- ___ Bed-Wetting

NERVOUS SYSTEM

- X Numbness
- _____ Loss of Feeling
- _____ Paralysis
- _____ Dizziness
- _____ Fainting
- _____ Headaches
- _____ Muscle Jerking
- _____ Forgetfulness
- _____ Confusion
- _____ Depression
- _____ Fatigue

FEMALE

- _____ Vaginal Discharge
- _____ Vaginal Bleeding
- _____ Vaginal Pain
- _____ Breast Pain
- _____ Lumps on Breast

Are You Pregnant? ☐ YES ☐ NO

GASTRO-INTESTINAL SYSTEM

- _____ Poor Appetite
- _____ Poor Digestion
- _____ Gas Production
- _____ Excessive Hunger
- _____ Difficult Chewing
- _____ Difficult Swallowing
- _____ Excessive Thirst
- _____ Nausea
- _____ Vomiting Food
- _____ Vomiting Blood
- _____ Abdominal Pain
- _____ Diarrhea
- _____ Constipation
- _____ Black Stool
- _____ Bloody Stool
- _____ Hemorrhoids
- _____ Liver Trouble
- _____ Gall Bladder Problem

CARDIO-VASCULAR RESPIRATORY SYSTEM

- _____ Chest Pain
- _____ Pain Over Heart
- _____ Irregular Heartbeat
- _____ Poor Circulation
- _____ Ankle Swelling
- _____ Harden -Arteries
- _____ Varicose Veins
- _____ Blood Pressure

EYE, EAR, NOSE, THROAT

- _____ Asthma
- _____ Colds
- _____ Deafness
- _____ Ear Pain
- _____ Ear Discharge
- _____ Swollen Glands
- _____ Vision Changes
- _____ Nose Bleeds
- _____ Sinus Problems
- _____ Mouth Soreness

ave you ever:	YES	NO	If yes, briefly Explain:
ad a broken bone?		X	
een hospitalized?	X		FUSION
ad strains or sprains?		X	
sed a cane, crutch or other support?		X	
een struck unconscious?			
hospitalized for other than surgery?			

you:			
ke minerals, herbs or vitamins?	X		
ink you need minerals, herbs or vitamins?		X	
ave any drug allergy?		X	

hen did you last have:	NEVER	0-6 MO	6-18 MO	LONGER
inal x-ray			X	
inal examination			X	
ysical examination			X	

PLEASE PRESENT YOUR INSURANCE CARD TO THE RECEPTIONIST TO BE PHOTOCOPIED. THANK YOU.

nderstand and agree that health and accident insurance policies are an arrangement between an insurance carrier and myself. rthermore, I understand that this Chiropractic Office will prepare any necessary reports and forms to assist me in making collection m the insurance company and that any amount authorized to be paid directly to this Chiropractic Office will be credited to my count on receipt. However, I clearly understand and agree that all services rendered to me are charged directly to me and that I am rsonally responsible for payment. I also understand that if I suspend or terminate my care and treatment, any fees for professional rvices rendered to me will be immediately due and payable. Any past due accounts will be charged a 1.5% per month finance charge er 30 days.

te: 7-22-96 Signed: Gary Hannemann

(IF PATIENT IS A MINOR, NAME OF PARENT, GUARDIAN, ETC.)

AUTHORIZATION FOR CHIROPRACTIC TREATMENT

the undersigned, a patient in this office, hereby authorize BOYSON CHIROPRACTIC OFFICE to administer such treatment as is cessary, and to perform the following therapy and manipulation and such additional therapy or procedures as are considered rapeutically necessary on the basis of findings during the course of said treatment.

ereby certify that I have read and fully understand the reasons above Authorization for Chiropractic Treatments, the reasons why the ove named treatment is considered necessary, its advantage and possible complications, if any, as well as possible alternative modes tment, which were explained to me by BOYSON CHIROPRACTIC OFFICE.

o certify that no guarantee or assurance has been made as to the results that may be obtained.

te: 7-22-96 Signed: Gary Hannemann

both sides

AUTOMOBILE ACCIDENT QUESTIONNAIRE

PLEASE ANSWER ALL THE QUESTIONS COMPLETELY

Today's Date 11 / 26 / 96 SS# 388 - 56 - 7790

Last Name HANNEMANN First GARY Mid. Int. H

Address 1016 OVERLAND RD City APPLETON

State WI Zip 54911 - Home Phone #(414) 733 - 7143

Work Phone #(414) 731 - 3107 Marital Status S ☐ M ☒ D ☐ W ☐

Date of Birth 5 / 1 / 52 Occupation BANKER

Employer GREENTREE FINANCIAL SERVICING CORP.

Employer Add/Cty/St/Zip

Spouse / Parents Name MARY JO Employer APPLETON AREA SCHOOL D

***WHO REFERRED YOU TO OUR OFFICE?

Date of Accident/Injury 11 / 10 / 96 Time 9:30 a m (AM) / PM

Please explain in detail how your accident happened: Hit by pickup truck that crossed center line & struck my van behind drivers door on left side. I was pushed into ditch & against a tree on right side of road

Were police notified? YES ☒ NO ☐ Do you have a police report? YES ☒ NO ☐

Were you knocked unconscious? YES ☐ NO ☒ If so, for how long?

You were struck from BEHIND ☐ FRONT ☐ LEFT SIDE ☒ RIGHT SIDE ☐

You were DRIVER ☒ PASSENGER ☐ FRONT SEAT ☐ BACK SEAT ☐

Where did you feel pain immediately after the accident? BACK & NECK

Where were you taken after the accident? DOOR COUNTY MEDICAL CENTER

What treatment was given?

Was any other doctor consulted after your accident? YES ☐ NO ☒

What was the doctor's name?

What treatment was given? Xrays ice pack

HEALTH QUESTIONNAIRE: Please check the symptoms you are now experiencing:

MUSCULO-SKELETAL SYSTEM

- [X] Low Back Problems
- [ ] Pain Between Shoulders
- [ ] Neck Problems
- [ ] Arm Problems
- [ ] Leg Problems
- [ ] Swollen Joints
- [ ] Painful Joints
- [ ] Stiff Joints
- [ ] Sore Muscles
- [ ] Weak Muscles
- [ ] Walking Problems

GENITO-URINARY SYSTEM

- [ ] Bladder Trouble
- [ ] Excessive Urination
- [ ] Scanty Urination
- [ ] Painful Urination
- [ ] Discolored Urine
- [ ] Prostate (Men)
- [ ] Bed-Wetting

NERVOUS SYSTEM

- [X] Numbness
- [ ] Loss of Feeling
- [ ] Paralysis
- [ ] Dizziness
- [ ] Fainting
- [X] Headaches
- [ ] Muscle Jerking
- [ ] Forgetfulness
- [ ] Confusion
- [ ] Depression
- [ ] Fatigue

FEMALE

- [ ] Vaginal Discharge
- [ ] Vaginal Bleeding
- [ ] Vaginal Pain
- [ ] Breast Pain
- [ ] Lumps on Breast

Are You Pregnant? ☐ YES ☐ NO

GASTRO-INTESTINAL SYSTEM

- [ ] Poor Appetite
- [ ] Poor Digestion
- [ ] Gas Production
- [ ] Excessive Hunger
- [ ] Difficult Chewing
- [ ] Difficult Swallowing
- [ ] Excessive Thirst
- [ ] Nausea
- [ ] Vomiting Food
- [ ] Vomiting Blood
- [ ] Abdominal Pain
- [ ] Diarrhea
- [ ] Constipation
- [ ] Black Stool
- [ ] Bloody Stool
- [ ] Hemorrhoids
- [ ] Liver Trouble
- [ ] Gall Bladder Problem

CARDIO-VASCULAR RESPIRATORY SYSTEM

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- [ ] Pain Over Heart
- [ ] Irregular Heartbeat
- [ ] Poor Circulation
- [ ] Ankle Swelling
- [ ] Harden -Arteries
- [ ] Varicose Veins
- [ ] Blood Pressure

EYE, EAR, NOSE, THROAT

- [ ] Asthma
- [ ] Colds
- [ ] Deafness
- [ ] Ear Pain
- [ ] Ear Discharge
- [ ] Swollen Glands
- [ ] Vision Changes
- [ ] Nose Bleeds
- [ ] Sinus Problems
- [ ] Mouth Soreness

lave you ever:	YES	NO	If yes, briefly Explain:
lad a broken bone?		X	
ieen hospitalized?	X		SPINAL FUSION
'ad strains or sprains?	X		
sed a cane, crutch or other support?		X	
een struck unconscious?		X	
) hospitalized for other than surgery?		X	

o you:			
ike minerals, herbs or vitamins?	X		
ink you need minerals, herbs or vitamins?		X	
ave any drug allergy?		X	

hen did you last have:	NEVER	0-6 MO	6-18 MO	LONGER
inal x-ray		X		
inal examination		X		
ysical examination			X	

PLEASE PRESENT YOUR INSURANCE CARD TO THE RECEPTIONIST TO BE PHOTOCOPIED. THANK YOU.

nderstand and agree that health and accident insurance policies are an arrangement between an insurance carrier and myself. thermore, I understand that this Chiropractic Office will prepare any necessary reports and forms to assist me in making collection n the insurance company and that any amount authorized to be paid directly to this Chiropractic Office will be credited to my :ount on receipt. However, I clearly understand and agree that all services rendered to me are charged directly to me and that I am sonally responsible for payment. I also understand that if I suspend or terminate my care and treatment, any fees for professional vices rendered to me will be immediately due and payable. Any past due accounts will be charged a 1.5% per month finance charge r 30 days.

e: 11-26-96 Signed: X Mary H. Hanneman

(IF PATIENT IS A MINOR, NAME OF PARENT, GUARDIAN, ETC.)

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e undersigned, a patient in this office, hereby authorize BOYSON CHIROPRACTIC OFFICE to administer such treatment as is essary, and to perform the following therapy and manipulation and such additional therapy or procedures as are considered apeutically necessary on the basis of findings during the course of said treatment.

eby certify that I have read and fully understand the reasons above Authorization for Chiropractic Treatments, the reasons why the e named treatment is considered necessary, its advantage and possible complications, if any, as well as possible alternative modes itment, which were explained to me by BOYSON CHIROPRACTIC OFFICE.

certify that no guarantee or assurance has been made as to the results that may be obtained.

: 11-26-96 Signed: X Mary H. Hanneman

beneficial that they shouldn't be informed that in fact they were risking paralysis or death by proceeding."

MR. KOENEN: Your Honor, I'm going to object to the form of the question as multiple and vague as to the definition of a lot of terms in that; that -- that --

THE COURT: I think it's understandable. You can answer it. Overruled.

A Okay. Again if the -- if the treatment in question is controversial, I probably wouldn't indicate that to the patient either. In other words, if there were -- there was no definite or absolute indications from any authorities that this in fact existed, I probably again wouldn't alarm the patient falsely and create other problems with him not receiving treatment.

BY MR. PETERSON:

Q So if there is a risk of which you are aware, although it is rare, of paralysis or death, if it's a rare risk, you think your treatment is so beneficial to the patient that you don't want them to hear about that and perhaps decide themselves not to proceed with the treatment because you believe it to be beneficial. Do I misunderstand?

A If it's -- if the risk is astronomical, yes.

Q Now, in Mr. Hannemann's case --

Q And a cardio -- a neurovascular injury can cause a stroke.
A Yes.
Q And a stroke can cause you to be paralyzed for the rest of your life.
A Yes.
Q A stroke can cause you to die.
A Yes.
Q A stroke can cause you to be left disabled.
A Yes.
Q And did you tell Mr. Hannemann when you first started treating him in July 1976 (sic) so he could participate in the decision as to whether he wanted to proceed with your treatment that he was at risk for neurovascular injury when he had a cervical adjustment done?
A No.
Q You say you talked about disk problems, degenerative problems and the fact that the pain might be worse before it gets better. Anything else that you talked about in that first conversation about informed consent?
A Fractures, disk problems you mentioned.
Q Doctor, I'd ask --
A No, I don't believe anything else.
Q I'd ask you to turn to page 20 of your deposition,

Chapter Chir 11

PATIENT RECORDS

Chir 11.01 Definition. As used in this chapter "patient record" means patient health care records as defined under s. 146.81 (4), Stats.

History: Cr. Register, May, 1997, No. 497, eff. 6–1–97.

Chir 11.02 Patient record contents. (1) Complete and comprehensive patient records shall be created and maintained by a chiropractor for every patient with whom the chiropractor consults, examines or treats.

(2) Patient records shall be maintained for a minimum period of 7 years as specified in s. Chir 6.02 (27).

(3) Patient records shall be prepared in substantial compliance with the requirements of this chapter.

(4) Patient records shall be complete and sufficiently legible to be understandable to health care professionals generally familiar with chiropractic practice, procedures and nomenclature.

(5) Patient records shall include documentation of informed consent of the patient, or the parent or guardian of any patient under the age of 18, for examination, diagnostic testing and treatment.

(6) Rationale for diagnostic testing, treatment or other ancillary services shall be documented in or readily inferred from the patient record.

(7) Significant, relevant patient health risk factors shall be identified and documented in the patient record.

(8) Each entry in the patient record shall be dated and shall identify the chiropractor, chiropractic assistant or other person making the entry.

History: Cr. Register, May, 1997, No. 497, eff. 6–1–97.

Chir 11.03 Initial patient presentation. Upon presentation of a new patient, patient records shall contain the following essential elements as relevant or applicable to the evaluation and treatment of the patient:

(1) History of the present illness or complaints, and significant past health, medical and social history.

(2) Significant family medical history and health factors which may be congenital or familial in nature.

(3) Review of patient systems, including cardiovascular, respiratory, musculoskeletal, integumentary and neurologic.

(4) Results of physical examination and diagnostic testing focusing on areas pertinent to the patient's chief complaints.

(5) Assessment or diagnostic impression of the patient's condition.

(6) Treatment plan for the patient, including all treatments rendered, and all other ancillary procedures or services rendered or recommended.

History: Cr. Register, May, 1997, No. 497, eff. 6–1–97.

Chir 11.04 Daily notes. For patient visits in which the chiropractor carries out a previously devised treatment plan, daily notes shall be made and maintained documenting all treatments and services rendered, and any significant changes in the subjective presentation, objective findings, assessment or treatment plan for the patient.

History: Cr. Register, May, 1997, No. 497, eff. 6–1–97.

Statute was enacted to specifically apply to doctors. I mean the law, our law in Wisconsin, has historically distinguished between doctors and MD's on the one hand, and chiropractors treated as something completely different. Do not have the same license requirements.

The Statute on its face applies only to doctors. I think it would be unfair to assume, that the regulation means something that it doesn't say on its face. And like I said, we could simply not instruct the jury on informed consent and just be silent on that issue and inform the jury, instruct the jury on, on the negligence instructions.

MR. KOENEN: Also says on the Statute's face, there is a reason to not let this informed consent issue. There is really no evidence of what the risk is, other than it's approaching astronomical 1numbers. And whether there would be a duty under any circumstances to discuss that with the patient. I don't think that is a given, either. They have not offered proof that, that you know, what that risk is. And is it a risk that is one which needs to be disclosed to a patient?

MR. SCHNEIDER: I believe --

MR. KOENEN: I'm not done talking.

MR. SCHNEIDER: I'm sorry.

MR. KOENEN: Doctors are not obligated to disclose every single risk under any Statute. No doctor is. And unless there has been an establishment that that is a risk within the world of likely possibilities, I don't think there is a duty in the first instance to do that. Whether the Statute says that informed consent needs to be obtained or not, it's got to be informed consent about something that is possible to have have happen, not some astronomical thing.

MR. SCHNEIDER: Well, there is evidence that, that a reasonable chiropractor would inform a patient about the risk of a neurovascular injury. Dr. Makowski(sp) testified that that would be the standard of care. Doctor Murphy -- or I'm sorry, Dr. Wilder even testified that he informs his own patients about the risk of a neurovascular injury related to a chiropractic adjustment.

I think there is evidence that there is a risk and that it would be reasonable to inform a patient of that risk, as part of obtaining informed consent. But nonetheless, we are willing to forego informed consent instruction and simply instruct the jury on negligence.

MR. KOENEN: Then they don't have to deal with the language, that I think it explains why.

THE COURT: Yeah.

MR. KOENEN: Right.

THE COURT: Remoteness.

MR. SCHNEIDER: I don't think it's fair to impose a remoteness standard when there is no law pertaining to chiropractors that imposes a remoteness standard.

THE COURT: But don't you think if we ever get to the point where there is an Instruction dealing with chiropractors, that's correct, that actually remoteness will be part of it?

MR. SCHNEIDER: I don't know, I can't answer that. I mean here we have a gray, a risk of a grave, grave consequence. And that has to be balanced I think, with the

possibility of the occurrence in determining whether or not it should be discussed.

MR. KOENEN: Judge, you could rule as a matter of law, that he's done all he needs to do in terms of explaining the likely reasonable risks. He did obtain informed consent, written, that, that you -- that is in evidence and undisputed. You know I guess, the legal issue presented to you, is there a further duty now to go beyond that and talk about astronomical risks? And I think given the fact that, that he's complied, there is informed consent, he's complied with the Statute. There is no dispute on that.

Now the only remaining issue, is there an obligation that is not covered by the Statute to go beyond that and talk about astronomical risks? And risks of things that are, you know, by both sides' admission, are so remote that it's unlikely to ever happen. You know, you can as a matter of law state that, that based on the evidence, there is just not an issue on that.

MS. SCHNEIDER: There is absolutely an issue on that. Gary Hannemann

testified he was never informed of a number of risks that, that Dr. Boyson claims he informed him of. Dr. Boyson acknowledged that he never informed Gary Hannemann of the risks of a neurovascular injury. If we are going to use the standard Instruction, I would like to request we add a sentence to the end of the second paragraph.

THE COURT: Okay.

MR. SCHNEIDER: Which would be um, a chiropractor has a duty to disclose what a reasonable chiropractor in the chiropractic community in the exercise of reasonable care would disclose to his patient.

The Instruction talks about, the Instruction's really focusing on the patient and what is reasonable for the patient. But I think we also want to touch on what the chiropractic community does in terms of meeting the standard of care.

THE COURT: You got that in here?

MR. SCHNEIDER: It's part of a sentence that is included in here. It's the second sentence of my proposed Instruction. I was suggesting that we basically just, just use

a portion of that sentence, so it would say, a chiropractor has a duty to disclose what a reasonable, prudent chiropractor in the chiropractic community in the exercise of reasonable care would disclose to his patient.

MR. KOENEN: I disagree, I think the law as it is, it's very balanced toward what a reasonable patient would want to know. That the law is very clear on that, that it's supposed to be what a reasonable patient would want to know, or need to know, not --

MR. SCHNEIDER: But if we evaluated whether or not Dr. Boyson has completed the standard of care, I think there is evidence of what the standard in the chiropractic community is. And I think that's important to evaluate, in terms of whether or not he's met the standard of care. And this Instruction again is related to case law regarding physicians. And there is no clear-cut Instruction related to chiropractors. I think it would be reasonable for the jury to consider what the chiropractic community does in determining whether or not Dr. Boyson was negligent.

MR. KOENEN: I disagree, Judge.

THE COURT: I think we are aruging that. Get this thing redrafted and see what it looks like. It's one issue that we have.

MR. SCHNEIDER: Yes. The other issue was I -- one of the others is I believe Mr. Koenen wanted an Instruction on the absence of material witness.

THE COURT: 410. Hear his argument first.

MR. KOENEN: There are numerous physicians who saw Gary Hannemann immediately after the stroke. And Dr. Reider of radiology, Dr. Yasbak, to name a few, have all been mentioned to the jury as people who looked at him, diagnosed him, tried to figure out what was wrong, and they were not called. I think that there is an absence, is an inference that, that inferences can be drawn, drawn that that absence --

THE COURT: Ago head.

MR. SCHNEIDER: Your Honor, first of all, we filed the medical records in a timely fashion pursuant to the Statute. And we

give 1500 in connection with Hannemann, Hannemann's negligence, I would agree.

MS. SCHNEIDER: But then are you saying you also want this 1023.8?

THE COURT: 1023.8, we agreed it's one of the -- yesterday we agreed that we are going to give that. It's just that it was cut down.

MS. SCHNEIDER: Right, but are you saying --

MR. KOENEN: I want -- yes, I want 1023.8, with Paragraph 5, less the last two sentences. And also believe you got to give the eighth paragraph, as well. Talks about Gary Hannemann suffered from an illness before the treatment by Craig Boyson. In answering the question of damages you will entirely exclude from your consideration all damages which resulted from the original illness. Only consider the damages Gary Hannemann sustained as a result of the treatment by Greg Boyson.

THE COURT: I'm not going to give that paragraph at all, I don't think it applies. I think that says, if we say that's correct, that some of the damages caused here,

and the plateau, what more damages is caused by the adjustment, I don't think this is that kind of a case. Because it's either, either that was the cause, or this was the cause. They weren't both the cause, and then differentiate between the two.

MR. KOENEN: I think 9 talks about distinguishing between the two. 8 just says you got to not award for anything related to the spinal menengitis and only award for things you think Dr. Boyson did. It was a black and white language.

The one after it talks about distinguishing between the natural results of the thing and of the disease, and then how the chiropractic adjustment may have enhanced it. I agree that that isn't what we've got here. But 8 says he suffered from an illness, and to the extent you believe his problems are due to the illness they are not caused by Doctor Boyson you are only to award what Dr. Boyson caused in terms of damages. And it's the Instruction to separate--

THE COURT: Still claiming of piggybacking here or subtracting.

MS. SCHNEIDER: I think if you, if you want the first and second sentences you said of Paragraph 5, the cause question where there was a causal connection, that same Instruction I think, I think that takes care of it if that is what you're concerned about.

THE COURT: Run a copy of 120 -- 1023.8. The original Instruction, 1023.8. You want me to instruct first or last?

MR. PETERSON: What do you want?

MR. KOENEN: Probably before. I suppose then they know what the rules are. I don't care.

MR. PETERSON: Before is fine with me. Actually I hate sitting around, waiting for you.

THE COURT: You know, the old fashion way is to do it last. If I get agreement, I do it first. I would rather do it first.

MR. PETERSON: Rather do that too.

MR. KOENEN: Fine.

MR. PETERSON: It's a real empty feeling, sitting around that counsel table waiting for the Instructions to be read.

THE COURT: Where is the draft of 1023.2? Let's keep on 8, now that I got a copy of it. You want added back in what we had, assert the appropriate cause language to avoid duplication. Jury Instruction 100 should not be given, the following two bracket paragraphs are used. Well, which would seem to infer that you can go either way.

MS. SCHNEIDER: Uh-hun.

MR. KOENEN: Troy on the committee that drafted all these things?

THE COURT: Yes, he is.

MR. KOENEN: Get him in here, what's he doing?

MS. SCHNEIDER: I think 1500 takes care of it.

THE COURT: I don't have any problem reading, reading this portion twice. Because we are actually applying it to Questions Two and Four.

MR. KOENEN: Duplication, is not the harm. It's if you don't get the right rule in there, that's the problem. But I do think, and very strongly about this, there has to be some explanation to the jury that they are not

to -- if they believe, is that the research of the issue is already resolved.

(Messenger brings paperwork to Mr. Koenen:)

THE COURT: The more I look at this, I'm not going to do that either. I'm just going to read 1500.

MS. SCHNEIDER: Okay.

MR. KOENEN: Just so I can make a record, Judge, I understand you're ruling, I just want to make sure --

THE COURT: Go ahead.

MR. KOENEN: -- that the record is clean, 1023.8, I'm looking for the language to be read, it looks like -- in case this version is different than what the Court has, the evidence indicates without dispute that when plaintiff retained services of Dr. Boyson and placed himself under the chiropractor care was suffering from some disability resulting from prior problem or illness, that condition can not be regarded by you as in any way having been caused or contributed by the negligence on the part of the chiropractor. This question asks you to determine whether such condition as it was, has been aggravated or further impaired

as a result.

Also wanted the Paragraph 8, which is, it will be necessary for you to distinguish and separate the natural results and damages that flow from the original illness and that flow from the treatment. There has to be a way for the jury to separate those out.

THE COURT: You made your argument.

Now the other question is to get these in some kind of an order. Get the second page, I don't know where the heck this goes.

MS. SCHNEIDER: This negligence Instruction?

THE COURT: No, I've got -- I got parts laying all over the place.

MR. PETERSON: Are we done?

MR. KOENEN: Still have 1023.2 to finish up. Judge, I just think it's good with one, one little omission, that the last paragraph I think needs to be read.

THE COURT: No, it doesn't. Make your argument.

MR. KOENEN: Okay. I think the last paragraph that says 1023.2, if a doctor

offers to you an explanation of why he or she did not provide the explanation, if the explanation satisfies you, that that is not negligence. I mean, that's the heart of the balancing of this, of this informed consent responsibility. I think it's very important.

I also think there ought to be some language in there that says he's obligated to talk about what is known at the time. We are in 2003. He's back in 1997. There has been plenty of testimony that back then things aren't as they are now. And some reference to, to the state of the art at the time.

MR. PETERSON: Actually, I think the only evidence -- excuse me, the only evidence directly on that point was that, that the statistics were much worse for the doctor back then. I think Dr. Wilder said the statistics now seems to indicate that it's more remote than was believed before. That's the only evidence on that.

MR. KOENEN: Also think you have to have the questions then to track this -- the ones set out in 1023.1.

MS. SCHNEIDER: Well I mean, I

guess I've already made my record on why I disagree with 1023.2 as it's drafted. I think we are imposing limits on informed consent that doesn't exist anywhere in the law by using this Instruction. The chiropractic regulations does not indicate that a chiropractor is not obligated to provide information about remote possibilities. That requirement has only been imposed upon informed consent as it relates to physicians.

THE COURT: Everybody got their argument on the record now?

MR. KOENEN: Are you going to give the questions?

THE COURT: Got to look at. Got to look at the verdict yet.

MR. KOENEN: Okay.

MS. SCHNEIDE: Judge, are, are you reading this negligence Instruction that we formulated? It doesn't have a number on it.

THE COURT: I don't know where it is right now. I've got to get my stuff in order.

MS. SCHNEIDER: Okay.

THE COURT: I can't even find the

person" is the first paragraph, or "Ordinary care" is the first paragraph?

MR. SCHNEIDER: "Every person", I believe.

MR. KOENEN: "Every person".

THE COURT: So this is the right draft?

MR. KOENEN: No, the other one.

THE COURT: Okay. So here we are. Any comments on this?

MR. KOENEN: On the verdict?

THE COURT: Yeah.

MR. KOENEN: Other than you take out 61.

MR. PETERSON: Is that where you're going to make the comment, Judge?

THE COURT: Yeah.

MR. PETERSON: Okay.

MR. KOENEN: The other thing, Judge, I think now if this Informed Consent is going to the jury, then we've got to ask the question that is set out in 1023.1.

MS. SCHNEIDER: Judge, I disagree, I think we are vying with the negligence question. I think that is just going to

confuse the jury and confuse the issue. The issue is whether or not he was negligent.

MR. PETERSON: I think that's intended for questions where the only issue is Informed Consent. That is not the only --

MR. KOENEN: One of my partners who tried a med-mal case down in Waukesha County -- that is how they framed it exactly. That is what has been created. It used to have the -- it was a tort of Assault and Battery. If you did something without first getting permission, then they decided that was too weird, but it wasn't quite negligence. So they have drafted this, this second set of questions. Again, I prefer the whole thing not be made an issue. But if we are going to have it, I think we got to follow the rules.

MS. SCHNEIDER: Just because some other Court decided to frame a verdict that way, that doesn't make it the rule.

MR. KOENEN: Wisconsin Civil Jury Instructions; it's not just the Court.

MR. PETERSON: That question Number Two is downright misleading.

MS. SCHNEIDER: I think using

these questions will confuse and mislead the jury.

THE COURT: Certainly confusing to me. I mean, you know, is this case based upon Informed Consent, or is it based, based upon negligence?

MS. SCHNEIDER: I mean, there --

THE COURT: What do we do with the negligence -- throw those off?

MR. KOENEN: I'm not, I'm just a messenger. This is what the law has turned into when you go down this road of Informed Consent. It's a, a tort, bottomed in negligence, is what that note says, whatever the heck that means. But it isn't, you know, you don't just -- it's not a standard of care issue. It's a, did he obtain informed consent issue, before proceeding separate from this standard of care.

THE COURT: So then when you compare negligence, what are you comparing? If you answered yes to, to Questions Two and Four relating to th

e doctor, or to one of those Questions Two and Four, then make the comparison. And yes to, to

Six. Which is the, which is, is the defendant's negligence at cause? So you get one yes, in the two cause questions for the defendant; and one yes in the two questions, in the cause questions, for the plaintiff, then you compare. So they could say he wasn't negligent as to treatment; but he was negligent as to not failing to provide information.

MS. SCHNEIDER: It would result in way too many questions. And I think it would just confuse and mislead the jury. It's going to make the issues very unclear. The negligence questions encompass Informed Consent of the jury is being struck on Informed Consent. We are using the Informed Consent Instruction that encompasses the Information that, that questions are eliciting. I think that takes care of the issue.

MR. PETERSON: Judge I know, it's my -- with your leave ---

THE COURT: Go ahead, please.

MR. PETERSON: Well, it seems to me that given that Murphy decision what they did is that they said this is a creature of a different nature in chiropractic. Doesn't

really talk and address the fact that there was this 1997 change. I wonder if it was even before the Court that this was a specific regulation now pertaining to Informed Consent with chiropractors.

All through the trial including Dr. Wilder, Dr. Wilder considered Informed Consent as a component of the standard of care. He specifically referred to it as a component of the standard of care. The jury has in every time they have heard about Informed Consent in the course of this trial, it's either been in the context of general negligence of the doctor. The question of general negligence of the doctor, or the only exception to that, was the reading of the regulations so that they knew in fact there was a regulation.

I think in the context of what we have been left with after Murphy that, that it's a general negligence question and that is the way we presented it all the way through the trial.

I understand Mr. Koenen's concern about the Instructions. And I understand the Courts are, Court's ruling, but I think putting the special verdicts in isn't consistent with the way the

jury was presented with the evidence, isn't consistent really with the law. And it is confusing as can be.

MS. SCHNEIDER: The Instruction and the verdict contained in 1023 is based on the Statute 448.30, which is not what the law is pertaining to chiropractors. I think the verdict should stay the --

THE COURT: We are not going to mess with the verdict. Let the appellate Court straighten this case out if it leads to it.

THE COURT: Interested in the order I'm going to read this, give these Instructions?

MR. KOENEN: Not too concerned, Judge.

MS. SCHNEIDER: I'm assuming you you have them in numerical order.

THE COURT: Got changed a little bit because I don't tell them about the Five-Sixths verdict --

MS. SCHNEIDER: Until the --

THE COURT: -- until the end.

MS. SCHNEIDER: And 109 is last, or second last. Closing.

skill and judgment or solely because a bad result may have followed his care and treatment. The standard you must apply in determining if Craig Boyson was negligent was whether Craig Boyson failed to use the degree of care, skill and judgment which reasonable chiropractors would exercise given the State of chiropractic knowledge at the time of the treatment in issue.

Use this paragraph -- (Judge pauses:) If you find from the evidence that more than one method of chiropractic treatment for Gary Hannemann's condition recognized as reasonable given the state of chiropractic knowledge at that time, Craig Boyson was at liberty to slect any of the recognized methods. Craig Boyson was not negligent because he chose to use one of these recognized treatment methods rather than another recognized method if he used reasonable care, skill, and judgment in adminstering the method.

You have heard testimony during this trial of witnesses who have testified as experts. The reason for this is because the degree of care, skill, and judgment which are reasonable

chiropractor would exercise is not a matter within the common knowledge of laypersons. This standard is within the special knowledge of experts and can only be established by the testimony of experts. You, therefore, may not speculate or guess what standard of care, skill and judgment is in deciding this case but must rather must attempt to determine it from the expert testimiony that you heard during this trial.

A chiropractor has the duty to provide his patient with information necessary to enable the patient to make an informed decision about a procedure and alternative choices of treatments. If the chiropractor fails to perform this duty, he is negligent.

To meet this duty, to meet his duty to inform the patient, the chiropractor must provide his patient with the information a reasonable person in the patient's position would regard as significant when deciding to accept or reject the medical treatment. In answering this question, you should determine what a reasonable person in the patient's position would want to know in consenting to or

rejecting a chiropractic treatment.

However, the chiropractor's duty to inform does not require disclose of:

Information beyond what a reasonably, well-qualified chiropractor in a similar classification would know; extremely remote possibilites that might falsely or detrimentally alarm the patient;

Every person in all situations has a duty to exercise ordinary care for his own safety. This does not mean that a person is required at all hazards to avoid injury; a person must, however, exercise ordinary care to take precautions to avoide injury to himself or herself.

Ordinary care is the care which a reasonable person would use in similar circumstances. A person is not using ordinary care and is negligent, if the person, without intending to do harm, does something, or fails fails to do something that a reasonable person would recognize as creating an unreasonable risk of injury or damage to a person or property. Question No. 2 and No. 4 read as follows: If you answered question 1 above

STATE OF WISCONSIN | CIRCUIT COURT BRANCH IV | OUTAGAMIE COUNTY

GARY HANNEMANN,

Plaintiff,

vs.

CRAIG BOYSON, D.C.,

Defendant.

Case No.: 00 CV 765

Code No.: 30101

AFFIDAVIT OF PATRICK F. KOENEN

STATE OF WISCONSIN)
)SS
COUNTY OF OUTAGAMIE)

Patrick F. Koenen, being first duly sworn on oath, deposes and says as follows:

1. I am a partner in the law firm of Hinshaw & Culbertson, the attorneys of records for the defendant, Dr. Craig Boyson.

2. I am duly authorized to submit this affidavit in support of Dr. Boyson's motion for a new trial.

3. At the jury instruction conference, I handed a copy of Wis. J.I.-Civil 1023.1 (2001, Regents, Univ. of Wis.) to Your Honor, and requested that the questions contained in this instruction be provided to the jury with respect to the issue of informed consent. A copy of Wis. J.I. Civil 1023.1 is attached as Exhibit A.

4. At the jury instruction conference, I also requested the Court provide the jury with Wis. J.I.-Civil 1023.2 (2001, Regents, Univ. of Wis.). A copy of the instruction discussed with the Court, after the Court downloaded it from its computer, is attached as Exhibit B.

5. A copy of the jury instruction submitted to the jury, after making substantial modifications to Wis. J.I. Civil 1023.2, is attached as Exhibit C.

Patrick F. Koenen

SUBSCRIBED and SWORN to
before me this 10th day of March, 2003.

Cathy F. Sell,
Notary Public, Outagamie County
My commission expires 2/20/05.

1023.1 PROFESSIONAL NEGLIGENCE: MEDICAL: INFORMED CONSENT: SPECIAL VERDICT

Questions 1, 2, and 3 of the special verdict form relate to the issue of informed consent and read as follows:

QUESTION 1: Did (doctor) fail to disclose information about the (insert treatment or procedure) necessary for (patient) to make an informed decision?

Answer: _____
Yes or No

QUESTION 2: If you answered question 1 "yes," then answer this question:
If a reasonable person, placed in (patient)'s position, had been provided necessary information about the (insert treatment or procedure), would that person have (refused) (accepted) the (insert treatment or procedure)?

Answer: _____
Yes or No

QUESTION 3: If you have answered both questions 1 and 2 "yes," then answer this question: Was the failure by (doctor) to disclose necessary information about (insert treatment or procedure) a cause of injury to (patient)?

Answer: _____
Yes or No

COMMENT

This special verdict was approved in 2000. This instruction previously was entitled "Malpractice: Patient Compensation Panel Findings." That instruction was withdrawn by the Committee when submission of a medical malpractice controversy to the panel was no longer necessary in 1986 as a prerequisite to filing a claim in circuit court.

The framework for this special verdict is based on the decision in Martin v. Richards, 192 Wis.2d 156, 531 N.W.2d 70 (1995). The plaintiff is required to establish that (1) the patient was not told of risks and alternatives; (2) the patient would have chosen an alternative if he or she had been adequately informed; and (3) the failure to disclose information was a cause of the patient's injuries. If there is a question of comparative negligence, use the format of Wis JI-Civil 3290.

Damages. For instructions on damages based on informed consent, see Wis JI-Civil 1741, Personal Injuries: Medical Care: Lack of Informed Consent, and Wis JI-Civil 1742, Personal Injuries: Medical Care: Offsetting Benefit from Operation Against Damages from Lack of Informed Consent.

LAW NOTE

REVISED MEDICAL INFORMED CONSENT INSTRUCTIONS WIS JI-CIVIL 1023.1, 1023.2, 1023.3, and 1023.4

In 2000, the Committee revised the entire informed consent series to reflect recent appellate decisions. These cases include: Martin v. Richards, 192 Wis.2d 156, 631 N.W.2d 70 (1995); Johnson v. Kokemoor, 199 Wis.2d 615, 545 N.W.2d 495 (1996); Schreiber v. Physicians Ins. Co. of Wisconsin, 223 Wis.2d 417, 588 N.W.2d 26 (1999); and Brown v. Dibbell, 227 Wis.2d 28, 595 N.W.2d 358 (1999).

Present Instructions: In 2000, the most recent published set of Wis JI-Civil contained the following four instructions which were withdrawn and recreated by the Committee:

- **Wis JI-Civil 1023.1 Malpractice: Patient Compensation Panel Findings (© 1989):** This instruction explains the evidentiary impact of the findings of the Patient Compensation Panel. This panel has long been abolished and the Committee concluded no pending actions would likely involve panel findings.

- **Wis JI-Civil 1023.2 Malpractice: Informed Consent (© 1999):** This instruction explains a doctor's duty to obtain a patient's informed consent. The instruction reads largely as it did when first approved in 1975. It was drafted based on the 1975 decision in Scaria v. St. Paul Fire & Ins. Co., 68 Wis.2d 1, 227 N.W.2d 647 (1975). The Committee updated the instruction to reflect the recent supreme court decisions, i.e., Martin, Johnson, Schreiber, Brown, and the legislature's passage of Wis. Stat. § 448.30.

- **Wis JI-Civil 1023.3 Cause: Medical Malpractice: Informed Consent Cases (© 1999):** This cause instruction was discussed in Martin v. Richards where the supreme court inferred that the instruction did not provide a sufficient nexus between negligence and damages. The Committee approved a revised cause instruction based on the standard cause instruction (Wis JI-Civil 1500).

- **Wis JI-Civil 1023.4 Cause: Medical Malpractice: Negligent Diagnosis or Omitted Treatment (© 1993):** This instruction was withdrawn in 1993 following a supreme court decision (Fischer v. Ganju) which held the instruction to be erroneous.

A. Informed Consent Case Law

Since 1973, the supreme court has recognized the doctor's legal duty to be "bottomed upon a negligence theory of liability" and not as a matter of assault and battery. Trogun v. Fruchtman, 58 Wis.2d 569, 207 N.W.2d 297 (1973). In Trogun, the "prudent patient" test was adopted for measuring the information a doctor should provide to his or her

patient. The standard adopted in Trogun was followed in Scaria two years later in 1975. Wis JI-Civil 1023.2, explaining the doctor's duty, was approved in 1975. The standard in Scaria was codified in Wis. Stat. § 448.30.

1. **Martin v. Richards, supra.** In Martin, the Wisconsin Supreme Court said that the primary force directing the parameters of informed consent is what a reasonable patient would want to know — not what doctors feel patients need to know. The court set forth the standard for physicians to follow when determining what information to provide a patient:

> The applicable statutory standard in informed consent cases in Wisconsin which is explicitly stated in Scaria and subsequently codified in 448.30, Stats., is this: given the circumstances of the case, what would a reasonable person in the patient's position want to know in order to make an intelligent decision with respect to the choices of treatment. A physician who proposes to treat a patient must make such disclosures as will enable a reasonable person under the circumstances confronting the patient to exercise the patient's right to consent to, or to refuse the procedure proposed or to request an alternative treatment or method of diagnosis. Id. at 176 (emphasis added).

Martin also held that information which must be told to the patient includes alternative forms of therapy or testing. Martin concerned the alleged failure by an emergency room doctor to inform an injured girl's father about the availability of a CT scan when the symptoms indicated possible intracranial bleeding.

Nothing was so told to the father on this or the possibility of a transfer of the patient to a Madison hospital since no neurosurgeon was available at the Fort Atkinson hospital. The girl later became a partial spastic quadriplegic allegedly due to delay in treating her. She was awarded significant damages by the jury. The supreme court held in Martin that the failure to have a 'cause' question on informed consent was not fatally defective "in this case" since the parties waived their objections to the verdict.

The 'cause' question in Martin was stated in the following way:

> "Would a reasonable person in Robert Martin's position have agreed to the alternate forms of care and treatment had he been informed of their availability?"

While claimant's attorney wanted a 'substantial factor' clause included in the instruction, defendants were arguing no informed consent issue as to Dr. Richards ought to be submitted to the jury.

The court of appeals determined that the question submitted failed to inquire that any negligence on the part of Dr. Richards to adequately inform the father caused injury to the injured girl. Reversal was ordered.

The supreme court reversed the reversal by the court of appeals concluding the parties waived any fatal defect for three reasons:

1. all attorneys agreed an affirmative answer to the above question would establish causation;
2. the defense attorney failed to object specifically to the failure to include a 'cause' question; and
3. the defense attorney has argued to the contrary before the trial court and had now switched positions.

The Committee was concerned that the court of appeals felt the suggested question in the comment to Wis JI-Civil 1023.3 was not sufficient to provide a nexus between negligence and damages, even though the instruction tells the jury a causal relationship exists if the question is answered affirmatively. In addition, the supreme court inferred it would have found a fatal defect had it not been for its conclusion the parties waived such a causation question.

2. Johnson v. Kokemoor, 199 Wis.2d 615, 545 N.W.2d 495 (1996). In 1996, the supreme court considered whether the circuit court erred in admitting evidence that the defendant, in obtaining the plaintiff's informed consent before operating to clip an aneurysm, failed: (1) to divulge the extent of his experience in performing this type of operation; (2) to compare the morbidity and mortality rates for this type of surgery among experienced surgeons and inexperienced surgeons like himself; and (3) to refer the plaintiff to a tertiary care center staffed by physicians more experienced in performing the same surgery. The court concluded that all three items of evidence were material to the issue of informed consent. Each item would have helped the patient make an intelligent decision and would have aided her exercise of informed consent.

3. Schreiber v. Physicians Ins. Co., 223 Wis.2d 417, 588 N.W.2d 26 (1999). In Schreiber, Mrs. Schreiber, the plaintiff, had previously delivered two children by caesarean section but elected a vaginal birth for her third child. During labor, she told her doctor that she changed her mind and wanted a caesarean section. He did not grant her request. The baby is a spastic quadriplegic. The parties stipulated that an earlier caesarean delivery would have resulted in the baby being normal.

The court held that a substantial change in circumstances, be it medical or legal, requires a new informed consent discussion. The court rejected the notion that the onset of a medical procedure forecloses a patient's right to withdraw consent; when consent is withdrawn, the physician is obligated under the informed consent statute to conduct a new informed consent discussion with the patient. The supreme court affirmed the court of appeals' "subjective" standard:

> In this type of informed consent case where the issue is not whether she was given the pertinent information so that her choice was informed, but rather whether she was given an opportunity to make a choice after having all of the pertinent information, the cause question is transformed into, 'What did the patient himself or herself want?' Id. at 436.

4. Brown v. Dibbell, 227 Wis.2d 28, 595 N.W.2d 358 (1999). This case involved a woman who underwent prophylactic bilateral mastectomies. The plaintiff sued her surgeon, alleging that he failed to properly disclose the risks and disadvantages of bilateral mastectomies, as well as the possible alternative treatments. The jury found both the plaintiff and her surgeon 50% causally negligent. The issue on appeal was whether contributory negligence can be a defense in an informed consent case.

While acknowledging that the physician-patient relationship assumes trust and confidence of the patient and that it would require an unusual set of facts to render a patient contributorily negligent, the court held that as a general rule, patients have a duty to exercise ordinary care for their own health and well being and that contributory negligence may, under certain circumstances, be a defense in an informed consent case.

The court noted that although the informed consent statute is silent about contributory negligence, informed consent cases are grounded on negligence theory and subject to the defense of contributory negligence.

The supreme court addressed three aspects of a patient's duty to exercise reasonable care in an informed consent action:

> • We therefore conclude that for patients to exercise ordinary care, they must tell the truth and give complete and accurate information about personal, family, and medical histories to a doctor to the extent possible in response to the doctor's requests for information when the requested information is material to a doctor's duty as prescribed by sec. 448.30 and that a patient's breach of that duty might, under certain circumstances, constitute contributory negligence. Id. at 48.

> • . . . [We] conclude that generally in an informed consent action, a patient's duty to exercise ordinary care does not impose on the patient an affirmative duty to ascertain the truth or completeness of the information presented by the doctor; nor does a patient have an affirmative duty to ask questions or independently seek information. Id. at 50.
>
> • . . . [E]xcept in a very extraordinary fact situation, a patient is not contributorily negligent for choosing a viable medical mode of treatment presented by a doctor. Id. at 53.

The court also held that the trial court erred in failing to instruct the jury about the defenses in § 448.30.

Section 448.30 establishes a standard of care for physicians in Wisconsin. It requires that physicians inform their patients of the availability of all alternative, viable medical modes of treatment unless one of six exceptions applies. The statute reads:

> Any physician who treats a patient shall inform the patient about the availability of all alternative, viable medical modes of treatment and about the benefits and risks of these treatments. The physician's duty to inform the patient under this section does not require disclosure of:
> 1. Information beyond what a reasonably well-qualified physician in a similar medical classification would know.
> 2. Detailed technical information that in all probability a patient would not understand.
> 3. Risks apparent or known to the patient.
> 4. Extremely remote possibilities that might falsely or detrimentally alarm the patient.
> 5. Information in emergencies where failure to provide treatment would be more harmful to the patient than the treatment.
> 6. Information in cases where the patient is incapable of consenting.

The supreme court in Brown declared that the optional fourth paragraph in Wis JI-Civil 1023.2 was misleading:

> . . . [T]he optional fourth paragraph is misleading because it can be construed as stating that the question of a doctor's failure to disclose information is to be answered from the doctor's perspective. The paragraph states that 'if such explanation [provided by the doctor] satisfies you that it was reasonable for the doctor not to have made such disclosures, you will find that the defendant did not fail in the duties owned by the doctor to the patient.' Wis JI-Civil 1023.2, Determining the reasonableness of the nondisclosure from the perspective of what a doctor believes should be disclosed, instead of what a reasonable patient wants to know, is an erroneous statement of the law of informed consent. Id. at 373.

B. The New Informed Consent Instructions

The revised instructions on medical informed consent are:

1. **Suggested Verdict** (Wis JI-Civil 1023.1). The suggested special verdict contains three questions:

> 1. Did (doctor) fail to disclose information about the (insert treatment or procedure) necessary for (patient) to make an informed decision?
>
> Answer: _____
> Yes or No
>
> 2. If you answered question 1 "yes," then answer this question:

If a reasonable person, placed in (patient)'s position, had been provided necessary information about the (insert treatment or procedure), would that person have (refused) (accepted) the (insert treatment or procedure)?

Answer: _____
Yes or No

3. If you have answered both questions "yes," then answer this question:
Was the failure by (doctor) to disclose necessary information about (insert treatment or procedure) a cause of injury to (patient)?

Answer: _____
Yes or No

2. **Negligence of Physician.** (Wis JI-Civil 1023.2). If a doctor fails to provide necessary information to the patient, then the doctor is negligent unless the doctor comes under one of the exceptions established in Wis. Stat. § 448.30.

How does the new Wis JI-Civil 1023.2 compare to the old Wis JI-Civil 1023.2?

- Both contain the "prudent (reasonable) patient standard."

- The new instruction includes noninvasive and diagnostic procedures as optional language.

- Both limit disclosure of available alternate procedures or treatments to those "approved by the medical profession."

- The new instruction does not use the term "material information." Both Martin and Kokemoor discussed the fact that "material" information must be disclosed. Similarly, the instruction does not use the term "viable" to describe the requisite discussion of alternative procedures and treatments. The Committee concluded that the words "material" and "viable" are not easily understood by jurors and that both concepts are addressed in the revised instruction.

- The new instruction tells the jury that the failure to provide necessary information is negligence.

- The new instruction lists the statutory exceptions to the doctor's duty that are contained in Wis. Stat. § 448.30. In Brown, the court said the doctor's duty varies from case to case and that the doctor's defenses may also vary. The court was unwilling to hold that the legislature intended to limit the defenses available to a doctor to these exceptions in Wis. Stat. § 448.30. It said a trial judge should be cautious about instructing on defenses beyond those the legislature has expressly provided. It should give the jury an instruction on defenses in addition to or in lieu of the statutory provisions in § 448.30 only when "evidence of a specific explanation for nondisclosure has been offered at trial" and should craft the instruction to fit the evidence and the prudent patient test.

- The last paragraph of the new instruction revises optional language dealing with a doctor's justification for not providing information to the patient. The doctor's explanation for not providing necessary information to a patient excuses the doctor only if a prudent patient

would not have wanted to know the information. The supreme court said the optional language contained in the present instruction was misleading.

3. **Cause Question** (Wis JI-Civil 1023.3). The Committee approved a new cause instruction to focus the jury's consideration of the third question in the suggested special verdict.

Based on the two decisions in Martin, the Committee revamped Wis JI-Civil 1023.3 to remove the language regarding causal relationship. Wis JI-Civil 1023.3 adapts the standard cause instruction (Wis JI-Civil 1500) to an informed consent claim.

4. **Contributory Negligence of Patient** (Wis JI-Civil 1023.4). The Committee declined to draft an instruction on contributory negligence. Although the court in Brown v. Dibbell suggested some of the patient's responsibilities when receiving treatment it said that:

> . . . as a general rule a jury should not be instructed that a patient can be found contributorily negligent for failing to ask questions or for failing to undertake independent research.

However, the court said it did not address whether a patient's duty to exercise ordinary care requires the patient to volunteer information or to spontaneously advise the doctor of material personal, family, or medical histories that the patient reasonably knows should be disclosed.

The Brown v. Dibbell court did recognize that the trial judge should have given the jury an instruction on contributory negligence tailored to the patient's duty to use ordinary care in providing complete and accurate information to the doctor in response to the doctor's question concerning personal, family, and medical histories.

1023.2 PROFESSIONAL NEGLIGENCE: MEDICAL: INFORMED CONSENT

Question _____ asks:

Did (doctor) fail to disclose information about the (insert treatment or procedure) necessary for (patient) to make an informed decision?

A doctor has the duty to provide (his) (her) patient with information necessary to enable the patient to make an informed decision about a (diagnostic) (treatment) (procedure) and alternative choices of (diagnostic) (treatments) (procedures). If the doctor fails to perform this duty, (he) (she) is negligent.

To meet this duty to inform (his) (her) patient, the doctor must provide (his) (her) patient with the information a reasonable person in the patient's position would regard as significant when deciding to accept or reject (a) (the) medical (diagnostic) (treatment) (procedure). In answering this question, you should determine what a reasonable person in the patient's position would want to know in consenting to or rejecting a medical (diagnostic) (treatment) (procedure).

The doctor must inform the patient whether (a) (the) (diagnostic) (treatment) (procedure) is ordinarily performed in the circumstances confronting the patient, whether alternate (treatments) (procedures) approved by the medical profession are available, what the outlook is for success or failure of each alternate (treatment) (procedure), and the benefits and risks inherent in each alternate (treatment) (procedure).

However, the physicians's duty to inform does not require disclosure of:

[• Information beyond what a reasonably, well-qualified physician in a similar medical classification would know;]

[• Detailed technical information that in all probability the patient would not understand;]

[• Risks apparent or known to the patient;]

[• Extremely remote possibilities that might falsely or detrimentally alarm the patient;]

[• Information in emergencies where failure to provide treatment would be more harmful to the patient than treatment;]

[• Information in cases where the patient is incapable of consenting.]

[If (doctor) offers to you an explanation as to why (he) (she) did not provide information to (plaintiff), and if this explanation satisfies you that a reasonable person in (plaintiff)'s position would not have wanted to know that information, then (doctor) was not negligent.]

COMMENT

This instruction was approved by the Committee in 2000. See Law Note at the end of Wis JI-Civil 1023.1.

To insure that a patient can give an informed consent, a physician or surgeon is under a duty to provide the patient with such information as may be necessary under the circumstances then existing to assess the significant potential risks which the patient confronts. The information that must be disclosed is that information which would be "material" to a patient's decision. Martin v. Richards, 192 Wis.2d 156, 174, 531 N.W.2d 70 (1995).

A physician's reasonable disclosure requires that a patient be informed regarding available options. A reasonable disclosure of significant risks, according to Scaria, requires an assessment of and communication regarding the gravity of the patient's condition, the probabilities of success, and any alternative treatment or procedures if they are reasonably appropriate so that the patient has the information reasonably necessary to form an intelligent and informed consent to the proposed treatment or procedure. In Martin, the supreme court said that the statutory doctrine of informed consent in Wisconsin is based upon the standard expounded by the Court of Appeals for the District of Columbia which held that information regarding risk is material when a reasonable person, in what the physician knows or should know to be the plaintiff's position, would be likely to attach significance to the risk or cluster of risks in deciding whether to forego the proposed therapy. Canterbury v. Spence, 464 F.2d 772 (D.C. CIR. 1972), cert. denied, 409 U.S. 1064 (1972). The supreme court, in Martin, said that a patient cannot make an informed decision to consent to the suggested treatment unless the physician discloses what is material to the patient's decision, i.e., all of the viable alternatives and risks of the treatment proposed.

What constitutes informed consent is based on what a reasonable person in the plaintiff's position would want to know. The standard regarding what a physician must disclose is described as the "prudent patient standard." The standard to which a physician is held is determined not by what the particular patient being treated would want to know but rather by what a reasonable person in the patient's position would want to know.

Comparative Risk Evidence. In Johnson v. Kokemoor, 199 Wis.2d 615, 545 N.W.2d 495 (1996), the supreme court rejected the defendant's proposed bright-line rule that it is error as a matter of law to admit evidence in an informed consent case that the physician failed to inform the patient regarding the physician's experience with the surgery or treatment at issue. The court said the prudent patient standard adopted by Wisconsin is incompatible with such a bright-line rule. As stated in Scaria and Martin, what a physician must disclose is contingent upon what, under the circumstances of a given case, a reasonable person in the patient's position would need to know in order to make an intelligent and informed decision. The question of whether certain information is material to a patient's decision and, therefore, requires disclosure is rooted in the facts of the particular case in which it arises. The supreme court in Johnson said that Wis. Stat. § 448.30 explicitly requires disclosure of more than just treatment complications associated with a particular procedure. It said physicians must disclose the availability of all alternate, viable medical modes of treatment in addition to the benefits and risks of these treatments.

The court in Martin rejected the argument that Wis. Stat. § 448.30 was limited by its plain language to disclosures intrinsic to a proposed treatment regimen. The court said there can be no dispute that the language in Scaria requires that a physician disclose information necessary for a reasonable person to make an intelligent decision. In Johnson v. Kokemoor, supra, the court said that when different physicians have substantially different success rates, whether surgery is performed by one rather than another, represents a choice between "alternate, viable medical modes of treatment" under Wis. Stat. § 448.30. For example, the court said that while there may be a general risk of 10 percent that a particular surgical procedure will result in paralysis or death, that risk may climb to 40 percent when the procedure is performed by a relatively inexperienced surgeon. Under Scaria, and the cases that followed as well as the codification of Scaria in

Wis. Stat. § 448.30, the second statistic would be material to the patient's exercise of an intelligent and informed consent regarding treatment options. The court concluded that when different physicians have substantially different success rates with the same procedure and a reasonable person in the plaintiff's position would consider such information material, the circuit court may admit this statistical evidence. The court refused to say that it will always require physicians to give patients comparative risk evidence in statistical terms to obtain informed consent. Instead, it held that evidence of morbidity and mortality outcomes of different physicians was admissible under the circumstances of the particular case.

Is There a Duty to Refer? The court in Johnson v. Kokemoor, supra, refrained from recognizing a distinct duty to refer. Other jurisdictions have recognized a duty to refer. The court in Johnson said that it was holding that a physician's failure to refer may, under some circumstances, be material to a patient's exercise of an intelligent and informed consent. 199 Wis.2d, 650, n.34. The court said information regarding a physician's experience in performing a particular procedure, a physician's risk statistics as compared with those of other physicians who perform that procedure, and the availability of other centers and physician's better able to perform that procedure in that which involved high risk surgery would have facilitated the plaintiff's awareness of "all the viable alternatives" available to her and aided her exercise of informed consent.

The court said the doctrine of informed consent focuses upon the reasonableness of a physician's disclosures to a patient rather than the reasonableness of a physician's treatment of that patient. Johnson v. Kokemoor at 629. The concept of informed consent is based on the tenet that to make a rational and informed decision about undertaking a particular treatment or undergoing a particular surgical procedure, a patient has the right to know about significant potential risks involved in the proposed treatment or surgery.

Whether a physician is negligent for not disclosing information requires a two-fold analysis: (1) what a reasonable person under the circumstances then existing would want to know, i.e., what is reasonably necessary for a reasonable person to make an intelligent decision with respect to the choices of treatment or diagnosis, and (2) what the physician knew at the time it is contended that he or she should have made the disclosure. Martin v. Richards, supra. Thus, a physician is not negligent for failing to disclose unless he or she either had sufficient knowledge about the patient's condition to trigger the physician's awareness that the information was reasonably necessary for the patient or the patient's family to make an intelligent decision regarding the patient's medical care or should have had that knowledge. Martin, supra. See also Kuklinski v. Rodriguez, 203 Wis.2d 324, 552 N.W.2d 869 (Ct. App. 1996).

Comparative Negligence. If there is a question of comparative negligence, use the format of Wis JI-Civil 3290.

Agreement Between Patient and Doctor. The discretion of the physician in treating a patient is limited when there is evidence of an express agreement between patient and physician. Thus, if a physician agrees to perform a specific operation, this instruction should be modified to place in issue the existence and scope of the alleged agreement. McMahon v. Brown, 125 Wis.2d 351, 355, 371 N.W.2d 414 (Ct. App. 1985). The court of appeals in McMahon, however, recognized that an emergency may justify departure from an agreement.

Special Verdict. If the special verdict asks: Did the doctor fail to adequately inform the patient? The instruction might continue: "If the doctor has offered reasons for not informing the patient, specifically (insert from fifth paragraph of comment) and these reasons satisfy you, you must find that the doctor did

not fail in the duty, and you will answer the question 'no.'" Alternate instruction: "If you are satisfied that (circumstances of fifth paragraph of comment) existed at the time of the doctor's treatment of the patient, the doctor had no duty of disclosure, and you will answer the question 'no.'"

Damages. For two instructions on damages based on informed consent, see Wis JI-Civil 1741, Personal Injuries: Medical Care: Lack of Informed Consent, and Wis JI-Civil 1742, Personal Injuries: Medical Care: Offsetting Benefit from Operation Against Damages from Lack of Informed Consent.

1023.2 PROFESSIONAL NEGLIGENCE: MEDICAL: INFORMED CONSENT

A CHIROPACTOR HAS THE DUTY TO PROVIDE HIS PATIENT WITH INFORMATION NECESSARY TO ENABLE THE PATIENT TO MAKE AN INFORMED DECISION ABOUT A PROCEDURE AND ALTERNATIVE CHOICES OF TREATMENTS. IF THE DOCTOR FAILS TO PERFORM THIS DUTY, HE IS NEGLIGENT.

TO MEET THIS DUTY TO INFORM HIS PATIENT, THE DOCTOR MUST PROVIDE HIS PATIENT WITH THE INFORMATION A REASONABLE PERSON IN THE PATIENT'S POSITION WOULD REGARD AS SIGNIFICANT WHEN DECIDING TO ACCEPT OR REJECT THE MEDICAL TREATMENT. IN ANSWERING THIS QUESTION, YOU SHOULD DETERMINE WHAT A REASONABLE PERSON IN THE PATIENT'S POSITION WOULD WANT TO KNOW IN CONSENTING TO OR REJECTING A CHIROPACTIC TREATMENT.

HOWEVER, THE PHYSICIANS'S DUTY TO INFORM DOES NOT REQUIRE DISCLOSURE OF:

INFORMATION BEYOND WHAT A REASONABLY, WELL-QUALIFIED CHRIOPRATOR IN A SIMILAR CLASSIFICATION WOULD KNOW;

EXTREMELY REMOTE POSSIBILITIES THAT MIGHT FALSELY OR DETRIMENTALLY ALARM THE PATIENT;

EXHIBIT

STATE OF WISCONSIN CIRCUIT COURT OUTAGAMIE COUNTY

GARY HANNEMANN,

Plaintiff,

vs.

CRAIG BOYSON, D.C.,

Defendant.

Case No.: 00 CV 765

Code No.: 30101

AFFIDAVIT OF HAND DELIVERY

I, Sabrina Y. Risch, being first duly sworn on oath, state that I am an employee of Hinshaw & Culbertson and not a party of this action; that on the 10th day of March, 2003, in the State of Wisconsin, County of Outagamie, I hand-delivered a Notice of Motion and Motion for New Trial, Brief in Support of Motion for New Trial and Affidavit of Patrick F. Koenen, to persons at the following addresses authorized to accept pleadings and deliveries for:

Mr. John C. Peterson
Robinson, Peterson, Berk & Cross, LLP
200 E. College Avenue
P.O. Box 5159
Appleton, WI 54913-5119

Clerk of Court
Outagamie County Courthouse
320 South Walnut Street
Appleton, WI 54911

Sabrina Y. Risch

SUBSCRIBED and SWORN to
before me this 10th day of March, 2003.

Cathy J. Sch
Notary Public, Outagamie County
My commission expires 2/20/05.

G1

1023.2 PROFESSIONAL NEGLIGENCE: INFORMED CONSENT

A CHIROPACTOR HAS THE DUTY TO PROVIDE HIS PATIENT WITH INFORMATION NECESSARY TO ENABLE THE PATIENT TO MAKE AN INFORMED DECISION ABOUT A PROCEDURE AND ALTERNATIVE CHOICES OF TREATMENTS. IF THE CHIROPRACTOR FAILS TO PERFORM THIS DUTY, HE IS NEGLIGENT.

TO MEET THIS DUTY TO INFORM HIS PATIENT, THE CHIROPRACTOR MUST PROVIDE HIS PATIENT WITH THE INFORMATION A REASONABLE PERSON IN THE PATIENT'S POSITION WOULD REGARD AS SIGNIFICANT WHEN DECIDING TO ACCEPT OR REJECT THE MEDICAL TREATMENT. IN ANSWERING THIS QUESTION, YOU SHOULD DETERMINE WHAT A REASONABLE PERSON IN THE PATIENT'S POSITION WOULD WANT TO KNOW IN CONSENTING TO OR REJECTING A CHIROPACTIC TREATMENT.

HOWEVER, THE CHIROPRACTOR'S DUTY TO INFORM DOES NOT REQUIRE DISCLOSURE OF:

INFORMATION BEYOND WHAT A REASONABLY, WELL-QUALIFIED CHRIOPRATOR IN A SIMILAR CLASSIFICATION WOULD KNOW;

EXTREMELY REMOTE POSSIBILITIES THAT MIGHT FALSELY OR DETRIMENTALLY ALARM THE PATIENT;

1005/1

EVERY PERSON IN ALL SITUATIONS HAS A DUTY TO EXERCISE ORDINARY CARE FOR HIS OR HER OWN SAFETY. THIS DOES NOT MEAN THAT A PERSON IS REQUIRED AT ALL HAZARDS TO AVOID INJURY; A PERSON MUST, HOWEVER, EXERCISE ORDINARY CARE TO TAKE PRECAUTIONS TO AVOID INJURY TO HIMSELF OR HERSELF

ORDINARY CARE IS THE CARE WHICH A REASONABLE PERSON WOULD USE IN SIMILAR CIRCUMSTANCES. A PERSON IS NOT USING ORDINARY CARE AND IS NEGLIGENT, IF THE PERSON, WITHOUT INTENDING TO DO HARM, DOES SOMETHING (OR FAILS TO DO SOMETHING) THAT A REASONABLE PERSON WOULD RECOGNIZE AS CREATING AN UNREASONABLE RISK OF INJURY OR DAMAGE TO A PERSON OR PROPERTY.

STATE OF WISCONSIN CIRCUIT COURT BRANCH IV OUTAGAMIE COUNTY

GARY HANNEMANN,

Plaintiff,

VS

CRAIG BOYSON, D.C.,

Defendant.

OUTAGAMIE COUNTY
FILED
FEB 20 2003
AT _____ O'CLOCK _____
RUTH H JANSSEN

VERDICT
CASE #00 CV 765

We the jury, impaneled and sworn to try the issues in this action, answer as follows:

QUESTION 1: Was Dr. Craig Boyson negligent with respect to his care and treatment of Gary Hannemann in August of 1997?

ANSWER: Yes
(Yes or No)

QUESTION 2: If you answered question 1 above "yes," please answer the following question. Was the negligence of Dr. Craig Boyson a cause of Gary Hannemann's neurovascular injury?

ANSWER: Yes 10 out of 12
(Yes or No)

QUESTION 3: Was Gary Hannemann negligent with respect to his own care by failing to follow the instructions of his treating physicians?

ANSWER: yes 10 out of 12
(Yes or No)

QUESTION 4: If you answered question 3 above "yes," please answer the following question. Was the negligence of Gary Hannemann a cause of his neurovascular injury?

ANSWER: NO 10 out of 10
(Yes or No)

QUESTION 5: If you have answered questions 2 & 4 above "yes," then answer this question. Assuming the total amount of negligence causing Gary Hannemann's neurovascular injury is 100%, how much negligence is attributable to:

1. Dr. Craig Boyson: _____ %
2. Gary Hannemann: _____ %

TOTAL 100%

QUESTION 6: What sum of money will fairly and reasonably compensate Gary Hannemann for the neurovascular injuries he sustained as a result of the chiropractic care provided by Dr. Craig Boyson with respect to:

1. Past Wage Loss: $ 13,500
2. Future Loss of Earnings: $ 13,500
3. Pain, Suffering and Disability: $ 200,000

Dated this 20 day of February, 2003.

Tom M Grosskopf
Foreperson

Dissenting juror Nancy Alfred
as to Question (s) 2 & 4

Dissenting juror Sharon Lupien
as to Question (s) 2

Jean Bernier
#3

Cathy Watson
#3

STATE OF WISCONSIN CIRCUIT COURT BRANCH IV OUTAGAMIE COUNTY

GARY HANNEMANN,

Plaintiff,

vs.

CASE NO. 00-CV-765

CRAIG BOYSON, D.C.,

Defendant.

TRANSCRIPT OF MOTION HEARING
April 4, 2003

Transcript of the proceedings had in the above action before the HONORABLE HAROLD V. FROEHLICH, Circuit Court Judge, Branch IV, Outagamie County, held at the Outagamie County Justice Center, in the City of Appleton, Outagamie County, Wisconsin, commencing on the 4th day of April, 2003.

APPEARANCES: JOLENE D. SCHNEIDER, Attorney at Law, appeared on behalf of the Plaintiff.

PATRICK F. KOENEN, Attorney at Law, appeared on behalf of the Defendant.

GARY HANNEMANN, Plaintiff, appeared in person.

(In open court commencing at 2:32 p.m.)

THE COURT: This is Gary Hannemann versus Craig Boyson, 2000-CV-765. Please state your appearances for the record.

MS. SCHNEIDER: Plaintiff appears in person and with his attorney, Peterson, Berk & Cross, by Jolene Schneider.

MR. KOENEN: Pat Koenen for the defendant.

THE COURT: Go ahead.

MR. KOENEN: Your Honor, it's always difficult and, frankly, a little uncomfortable to bring a motion like this where we're asking the Court to say that there was a mistake made in the trial. I understand it, your job, particularly during the jury instruction conference, is difficult. You've got a jury waiting and attorneys throwing papers back and forth on a table to you.

But as difficult as it is to bring this type of motion, I think it is important that we do this because I sincerely believe there is something fundamentally wrong with the verdict that we submitted to the jury and the instructions that were sent to them. And out of fairness to Dr. Boyson and in the interest of justice, I think we have to look at that and determine if there was a mistake and, if so, was it substantial

and did it prejudice my client? And I think it did.

The fundamental problem with the verdict is that it treated the concepts of negligence in treatment the same as negligence for failing to obtain informed consent. Unfortunately, these two concepts are not interchangeable. They're separate and distinct, and they can't be handled the same.

Negligence in treatment has to do with failing to do something properly during the treatment of a patient, such as failing to make a proper diagnosis or failing to do something right in the care of the patient. Negligence in failing to obtain informed consent has to do with the failure to share information with a patient. It has nothing to do with the actual treatment but, rather, the conveying of information that a patient -- a reasonable patient would want to know about the procedure. These are separate. They're distinct. They're not interchangeable; and, most importantly, they have separate proof requirements.

Now, this isn't my, you know, belief. This is clearly confirmed in the appellate law that we have in the State. Johnson, the Supreme Court case, which I've cited in our brief, and Finley versus Culligan, which I've also cited in the brief, clearly states they're separate and distinct towards, and they're separate and

distinct proof requirements, and they cannot be treated interchangeably.

And in light of this law and the way it's developed in every medical malpractice case where there are claims of negligence in treatment and claims of failure to obtain informed consent, there are separate verdict questions asked. There are two separate sets inquiring into the essential elements of both -- of both torts, and in no case would it be permitted to treat them the same as we've done here.

Now, interestingly, in reviewing the plaintiff's brief in opposition to my motion, they're not disagreeing with this statement of the law, and they have not said that I've misinterpreted Johnson or Finley or have in any way misstated that they're two separate and distinct torts. I think we'll hear what they have to say, but the omission of any statement to the contrary and the lack of any cases to the contrary makes it quite clear that what we're saying is accurate legally.

What they've tried to do though is step around this obvious point in the law by saying that informed consent principles don't apply to chiropractors; that that's medical malpractice law we're citing. We're in a chiropractic malpractice case, and because of that,

all of this that I've cited is inapplicable.

And their argument though, if you look at it and you look at the basis of it, really isn't persuasive or with any legal merit, and the fundamental underpinning they have for this is this Murphy case. It was discussed in our instruction conference, and it's highlighted quite heavily in their brief. They basically say that Murphy stands for the proposition that 448, Informed Consent, doesn't apply. And I think, first of all, they're overstating what that case means; but, secondly, it's clearly not applicable to this case.

In Murphy, the treatment that was involved occurred in January of 1993. It's four years before Wisconsin Administrative Code 1105 -- 11.02(5) was created. The law changed after Murphy was decided. There would have been no -- no legal basis similar to this case in Murphy. I think that's a very, very important factual distinction.

I also believe it's very important that that -- the issue of whether or not informed consent wasn't squarely presented to the Court of Appeals as it is in this case. That had to do with a failure to refer a patient with low back pain, chiropractor continually treated. There's no allegation that the chiropractor

caused the low back pain. It's just a failure to refer.

This is far different. This case is far different where they're alleging that a chiropractic adjustment caused a complication, and I -- I think the factual dissimilarities, the timing of when the treatment in Murphy took place as compared to the change in the law, makes that case inapplicable to this particular situation.

I also think -- and this is perhaps more important -- that, logically, the argument that they're putting forward doesn't make sense when you look at our laws. Why would the law treat the informed consent obligations of a chiropractor and the defenses it limits to that any different than it would treat it for a medical doctor? Surgeons, obviously, have a duty of informed consent. Dentists would have a duty of informed consent. Physiatrists -- podiatrists would have that, and physiatrists, physical medicine doctors who actually use principles of physical therapy and manipulations, would have an obligation of informed consent. Why would it be that a chiropractor should be treated any different or have any less of a proof requirement for someone accusing him or her of not obtaining informed consent than any of these other

people? If you claimed informed consent against anybody in that other group, you'd have to prove all of the elements. Why would it be logically that the law would treat a chiropractor any differently? Why would the law treat the chiropractor any different than a common person? This Court, I'm sure, has had claims of assault and battery with just normal people. There is a defense to that in the form of consent.

What I'm pointing out here is, the law of informed consent was a common law principle that predated 448 when it was codified for medical doctors, but 448, the statute, is nothing more than a codification of the common law, which existed prior to nineteen -- I think -- seventy-four. It's a principle of informed consent that grows out of this concept of assault and battery and the need to get someone's permission before they're touched that existed in the common law long before 448, and it still exists in the common law, and there is no reason that the law should carve a little exception out for chiropractors and treat them any differently.

So factually, logically, legally, there is no reason in this case to merge those two concepts together.

What the plaintiff wanted in this case and what

they ultimately got was a chance to accuse Dr. Boyson of failing to obtain informed consent. They argued that over and over with every single witness, and they argued it in closing argument. They got to do all that, make all those accusations, put in that evidence, but then the Court didn't require them to establish the elements of informed consent to answer that line of questions that must be answered by a jury to obtain liability on an informed consent claim. They weren't required to do that. They got the benefit of the accusation, they got the benefit of some powerful argument, but they didn't have the obligation of answering the questions that are essential to an informed consent claim.

Had the jury been given those questions, it is possible that they could have said, yes, Dr. Boyson was negligent for failing to share information about the treatment, the risk of a stroke, but they could have also answered -- and we'll never know -- we'll never know the answer to the first question because it was never asked, but they could have answered a second question that I asked the Court to give, would a reasonable patient have refused the treatment even if they got the information?

If they would have said, yes, he's negligent for

failing to disclose the information but no, a reasonable patient in Mr. Hannemann's position wouldn't have refused it, that's a defense verdict. And because those questions were never asked, we'll never know why they found Dr. Boyson negligent.

We'll never know if they would have possibly found that a reasonable patient wouldn't have refused the treatment; and Dr. Boyson, by virtue of that, is deprived of a very legitimate and reasonable possibility of a defense verdict. And the law says, when that occurs, when there is a reasonable possibility of a different outcome, that is prejudicial. That is depriving a client -- or a party to a lawsuit of a substantial right, and it undermines the confidence in the outcome. It undermines the confidence that the jury had the right law and the right questions, and the whole result becomes highly suspect as to what did they mean, why did they find negligence?

And under our law and under the statutes, this Court has the power and, in fact, the obligation to look at this and say, you know, is that right? Was that done properly? And is there a reasonable possibility that the outcome in this case was somehow affected by that?

And I think that that -- that is in fact what happened here, and I think that, for that reason, Dr. Boyson is entitled to another trial and another opportunity to ask a jury and argue to a jury that the failure to disclose this information really would not have made any difference.

So for that reason, Judge, I think the verdict and its formulation is improper and we should have another trial.

The second problem -- major problem, I think, with the case -- and it's, I think, more clear -- is the instructions on informed consent that were given. This Court decided to give an instruction on informed consent, but it deleted the last paragraph of the instruction, 1023.2. Now, that deletion, which said that if a doctor provides a reasonable explanation for why he didn't disclose certain information such that a reasonable patient would agree that it wasn't obligated to give that information, he's not negligent. That was taken out.

Now, in this district, District 3, in a very similar case, Judge Hoover looked at an instruction where a judge in your position took that same paragraph out and said that was prejudicial. That's reversible error and sent it back for a retrial because of that.

The judge said that that last paragraph does not subsume all those other exceptions that precede it. It's separate and it needs to be given, and if it doesn't, it doesn't balance out fairly the obligation of a doctor to give information with the limits on that. And that last paragraph's critical because it specifically says if the explanation, no matter what it is, would satisfy a reasonable patient -- not this patient but a reasonable patient -- then he's not negligent for not sharing information. And to take that away, I think, imbalances the obligations with the limitations; and in this district, according to Judge Hoover, that is reversible error.

In this case, Dr. Boyson said, you know, in his mind -- and Dr. Wilder confirmed this -- there was controversy as to whether or not the existence of the risk of a stroke even was real. That was not an assumed or established fact back in 1996 and 1997. There is no place in Your Honor's instruction that permits that as an explanation. The way we have it is, you don't have a obligation to disclose remote risks, but that presumes there is a risk at all; and in this case, I think it's not only just not remote in Dr. Boyson's mind but not even real, and I think there is a very reasonable possibility that a juror, using the

reasonable patient standard, could say, yeah, I don't think it's necessary to talk about controversial things that aren't even well established in the field as risks.

So I think in light of Brown and in light of the facts of this case and in light of the deletion of that very important paragraph, again that's an error that could very well have changed the outcome of the case, and there should be a new trial ordered on that ground as well.

I also believe, in light of the existence of -- co-existence of a diagnosis of spinal meningitis and the adjustment, the causation instruction should have told the jury there to separate out whatever disabilities or problems they felt were due to spinal meningitis as opposed to chiropractic adjustment.

We clearly brought you the testimony of Dr. Viste and Dr. Hauton, the neuroradiologist and neurologist, who said that they believe that the problems that the patient was having was due to spinal meningitis. The jury, theoretically, could have felt that Dr. Boyson caused some harm, but the spinal meningitis did something as well, and they were not given an opportunity or instruction that they're to differentiate between the two. And I believe that, as

well, is a problem.

For those reasons, Judge, and, most particularly, I think in the interest of fairness to the defendant and in the interest of justice, a new trial should be ordered in this case.

THE COURT: Counsel.

MS. SCHNEIDER: Judge, this is not a medical malpractice case. This is a chiropractic negligence case, and the Court submitted the correct form of verdict to the jury. The special verdict proposed by the defense, 1023.1, does not apply to the failure of a chiropractor to obtain the informed consent of his patient. 1023.1 was developed based upon the law for physicians as set forth in Wisconsin statute 448.30, which does not apply to chiropractors on its face. And that is consistent with the longstanding tradition of Wisconsin law differentiating between rules and regulations that apply to physicians, on the one hand, and different rules and regulations that apply to chiropractors on the other hand.

Physicians and chiropractors, for example, are not held to the same standard of care. The Kerkman case, which we cited in our brief, specifically held that chiropractors are held to a separate chiropractic standard of care. The licensure requirements for a

physician and a chiropractor are also distinct, and in Chapter 446 of the Wisconsin Statutes, the Chiropractic Examining Board authorizes the creation of administrative regulations, and from that, we get chiropractic 11.02(5), which basically states that all patient records shall include documentation of the informed consent of the patient. That is drastically different from the requirements that are imposed upon physicians that are contained in 448.30.

Now, the legislature has elected to create this very specific statute that applies, on its face, only to physicians. It's contained in chapter 448, which regulates medical practices. We have, on the other hand, this administrative regulation created by the Chiropractic Examining Board that applies only to chiropractors. They are completely distinct standards for completely distinct professions that are regulated in distinct ways under our laws, and there is just no basis for concluding that a statute designed to regulate physicians should apply to chiropractors.

Now, in the Murphy case, the plaintiff brought a negligence action against her chiropractor, and she basically had a two-pronged theory in bringing her case. One was that the chiropractor was negligent in not referring her for medical treatment; and, second,

that he was negligent in failing to obtain her informed consent. And in support of her theory of negligence in failing to obtain informed consent, she specifically cited the statute 448.30, and the Court of Appeals looked at that and said, no, that doesn't apply to chiropractic. This statute, on its face, applies only to physicians, and 448.30 is applicable to physicians and to cases that derive from medical malpractice claims. It does not apply whatsoever to a chiropractic negligence case.

Based upon the clear language in the statute in the Murphy case, it's clear that anything deriving from that statute would not apply to a chiropractic negligence case.

The special form verdict contained in 1023.1 was created based upon the law as set forth in section 448.30. Therefore, it does not apply to a chiropractic negligence case, and the Court was correct in refusing to submit that form verdict to the jury.

The failure for a chiropractor to obtain the informed consent of his patient just simply constitutes negligence, and the defense is quite concerned about the fact that there do not seem to be the same types of limitations on that obligation as there clearly exists for physicians. That's because the legislature chose

to create those limitations for physicians. If there are to be similar written limitations on the scope of the duty of a chiropractor to obtain informed consent, those limitations are not for us to create here. Those limitations should be created by the legislature or by the Department of Regulation & Licensing. They have, for whatever reason, chosen not to create such specific parameters on the duty of a chiropractor to obtain informed consent.

Prior to 1997, there was no written regulation at all requiring chiropractors to obtain informed consent. Since that time there has been no modification to the Administrative Code provision that's in place. Presumably, there is a reason for that. It's not our job to usurp the role of the legislature and create obligations that they specifically decline to create.

The defense has argued, I think, today and back at the instruction conference that if we don't apply this scope of informed consent that exists for physicians, then the obligation of a chiropractor to obtain informed consent is limitless, and that's simply not true.

The limits upon that obligation are those that would be imposed by a reasonable chiropractor under the same conditions that were faced by Dr. Boyson. And we

heard lots of testimony during the trial from Dr. Murkowski, the plaintiff's liability expert; from Dr. Wilder, the defense liability expert, as to the incidence of neurovascular injury resulting from cervical manipulation, as well as the necessity of informing a patient of that risk. And even Dr. Wilder, the defense liability expert, testified that he informs his own patients of this risk. And so it's not as though, if we don't apply 448.30 in this situation, that it's just a slippery slope with no end. There are limits, and that is what the jury determined in deciding whether or not Dr. Boyson met the standard of care. Use of 1023.1 would have just simply confused and misled the jury because it stated incorrectly the law that applied to this case.

Now, even if the Court would determine that it was error to use that -- or decline to use that particular verdict form, it was really harmless because the jury was informed of the law for physicians under section 448.30, when the Court instructed the jury on informed consent using the Court's version of 1023.2.

The Court will recall that the plaintiff, in fact, objected to the Court's use of 1023.2 at trial. Instead, the plaintiff submitted his own proposed instruction on informed consent. That was not derived

from the statute applying to physicians. We, instead, submitted a proposed instruction that was based upon the Black's Law Dictionary definition of informed consent.

The Court overruled our objection and decided to use 1023.2. That instruction, as a whole, correctly stated the law under 448.30, and, if anything, the defense benefited from the Court's use of that instruction because for the reasons I've already stated. The instruction, 1023.2, does not apply to a chiropractic negligence case. It's derived from medical malpractice cases, which are not binding or precedential in relation to chiropractic negligence cases, and they're based upon a statute that clearly, on its face, does not apply to chiropractic negligence.

The cases that the defense cites related to the use of 1023.1 and 1023.2 are medical malpractice cases, cases brought under chapter 655, which does not apply to chiropractic; cases involving alleged violations of the statute 448.30, which do not apply to chiropractic. Therefore, those cases are not binding on this Court and do not provide us with any binding precedent relating to this issue.

Now, the defense indicates that there was evidence from which the jury might have concluded that there was

no basis for a risk between the risk of neurovascular injury following a cervical adjustment, and I believe the overwhelming evidence suggested that in fact there was a risk. There was dispute about the incidence of such a risk in 1997, but both plaintiff's liability expert and the defense liability expert conceded that there was, in fact, a risk; and, in fact, the evidence showed that the belief back in 1997 was that the incidence of such an injury occurring following cervical adjustment was even higher in 1997 than it was today. So the assertion that the jury would have been misled in some way, I don't think, is supported by the evidence whatsoever.

With respect to causation, I don't believe there is any probability that the jury was misled. The defense was requesting the Court to use the final paragraphs, 1023.8, which simply did not apply to the facts of this case. Those paragraphs address situations where there may be an aggravation of a pre-existing condition or where two health conditions may have acted in concert to cause a particular injury to a plaintiff. And here there was no evidence that anything such as that existed.

Dr. Viste, on behalf of the defense, proffered a theory whereby the cervical adjustment had absolutely

nothing whatsoever to do with Mr. Hannemann's injury, and the -- the plaintiffs, on the other hand, maintained throughout the trial that it was the cervical adjustment that caused Mr. Hannemann's injury.

There was no evidence presented to the jury whatsoever that, in any way, the meningitis and the cervical adjustment could have somehow acted together to cause the injury. There was no evidence presented that the cervical adjustment could have aggravated the condition of meningitis, which could have exacerbated Mr. Hannemann's injury. Therefore, the Court was correct in declining to use that instruction and instead properly instructed the jury using the standard causation instruction No. 1500.

The interest of justice do not support a new trial in this case. The interest of justice support the finality of this jury's verdict. The -- this case is not a case where the real controversy was not tried. The real controversy was tried. This case was brought as a negligence action. The jury heard quite a heavy volume of evidence on negligence. Closing arguments consisted of vigorous arguments by both counsel as to whether or not Dr. Boyson was negligent. The failure of Dr. Boyson or any chiropractor to obtain the informed consent of his patient is simply negligence.

It's a component of the chiropractic standard of care, and the jury, after hearing all of the evidence and considering the Court's instructions, rendered a conclusion, and that should not be disturbed by this Court.

MR. KOENEN: Briefly, Your Honor. Plaintiff's argument, if I understand it right, seems to suggest that the duty of informed consent and all of its limitations must flow from the legislature, and if it's not -- if the legislature in 448.30 or some other statute doesn't set it out, then it doesn't exist. That gives the legislature, frankly, way more credit than I think it deserves. They -- 448 was nothing more than the legislature codifying the existing common law that existed long before the mid 1970s. This whole concept of informed consent, it grew out of the assault and battery laws. It existed well before, and it exists for chiropractors, doctors, anybody who was accused of, in that time, committing a battery upon somebody without their permission that led to an injury. It really -- to say that, unless the legislature specifically codifies this with respect to chiropractors, ignores years and years, decades, of common law created by the courts, applicable to all, that predated the creation of 448.30.

The argument also mixes and matches. It suggests that because 448.30 applies only to doctors, therefore, special verdict questions need not be asked of, you know, requiring each of the elements of informed consent. 448.30 has nothing to do with verdict question formulation. It has to do with instructions and what the law is and whether there is or isn't informed consent.

This Court though -- and it's a total judicial function -- is required to identify the elements that must be proven and then ask the appropriate questions to find out whether they have or haven't. That has nothing to do with statutes. That's -- that's a judicial function, interpretation of the law, whether it come from common law or statutory, and that's the problem. That's what wasn't done here. We don't know -- we had an allegation of informed consent violation with no questions by which to determine whether they met the elements of that, and whether it's medical malpractice, chiropractic malpractice or sexual assault, frankly, there's elements that need to be proven and shown, and you can't just throw it in under a negligence umbrella.

And those are the comments I'd have to plaintiff's arguments.

THE COURT: I think the real -- the real issue in this case was what caused the stroke. And I think both the state -- I mean, both the plaintiff and the defense put on a strong case as to their theory as to what caused the stroke itself; and, in my opinion, the jury could have went either way. They could have bought the defense theory that it was the meningitis and the -- and the way the spots looked on the spine from some of the -- I don't know which one of those negatives that we were shown, if that was the -- they took that slice of the neck and they look down and find five or six spots, and that theory was, therefore, since it wasn't just one big spot, this was not a stroke that was caused by -- by the adjustment. They could have bought that theory.

They could have bought the theory that the plaintiff, I think, successfully argued and presented that the stroke was caused by the adjustment and that the -- the activities on the 23rd, the second time, was clearly negligent, in their opinion. And that's what they bought.

I think the instructions, if they were in error in any way, were not substantial as to the decision in this case, and your motions are denied.

MS. SCHNEIDER: Thank you.

MR. KOENEN: Thanks, Judge.

(Proceedings concluded at 3:09 p.m.)

STATE OF WISCONSIN)
) ss.
OUTAGAMIE COUNTY)

I, Jeanne L. Spoehr, certify that I am the official court reporter for Branch IV of the Circuit Court of Outagamie County; and as such court reporter, I made full and accurate stenographic notes of the foregoing proceedings; that the same was later reduced to typewritten form; and that the foregoing is a full and accurate transcript of my stenographic notes so taken.

Dated and signed in the City of Appleton on the 5th day of August, 2003.

Jeanne L. Spoehr
Registered Merit Reporter
Certified Realtime Reporter
Outagamie County Justice Center

STATE OF WISCONSIN CIRCUIT COURT BRANCH IV OUTAGAMIE COUNTY

GARY HANNEMANN,

Plaintiff,

-v-

CRAIG BOYSON, D.C.,

Defendant.

CLERK OF CIRCUIT COURT
OUTAGAMIE COUNTY
FILED
MAY - 2 2003
AT ____ O'CLOCK
RUTH H. JANSSEN

Case No. 00-CV-765

JUDGMENT

Based on the jury verdict dated February 20, 2003 and the Court's Order for Judgment dated April 30th, 2003,

IT IS ADJUDGED THAT plaintiff, Gary Hannemann, shall recover from, and have judgment against defendant, Craig Boyson, D.C., the following:

1. The verdict sum of $227,000.00 and
2. Taxable costs in the amount of $4,378.16, plus statutory interest from the date of the verdict.

For a total judgment of $231,378.16, plus statutory interest from the date of the verdict.

Dated this 30th day of April, 2003.

BY THE CLERK:

Outagamie County, Wisconsin

SUPREME COURT OF WISCONSIN

RECEIVED
NOV 2 3 2004
CLERK OF SUPREME COURT
OF WISCONSIN

GARY HANNEMANN,

Plaintiff-Respondent-Petitioner,

v.

CRAIG BOYSON, D.C.

Defendant-Appellant.

Case No.: 03-1527
Outagamie County Circuit Court
Case No.: 00-CV-765

ON APPEAL FROM THE CIRCUIT COURT OF OUTAGAMIE COUNTY
THE HONORABLE HAROLD V. FROEHLICH,
CIRCUIT COURT JUDGE, PRESIDING

REPLY BRIEF OF PLAINTIFF-RESPONDENT-PETITIONER GARY HANNEMANN

PETERSON, BERK & CROSS, S.C.

200 East College Avenue
P.O. Box 5159
Appleton, WI 54912-5159
(920) 831-0300

John C. Peterson
State Bar No.: 1010965
Jolene D. Schneider
State Bar No.: 1023881

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I. AT THE TIME THIS CASE WAS TRIED THERE IS NO QUESTION THAT IT WAS WELL SETTLED WISCONSIN LAW THAT CHIROPRACTIC WAS NOT GOVERNED BY THE RULES AND REGULATIONS CONTROLLING MEDICINE, INCLUDING IN THE AREA OF INFORMED CONSENT.

The underlying assumption in the brief filed on behalf of Craig Boyson is that the practice of chiropractic is really just like the practice of medicine, and, therefore, the rules that govern informed consent in chiropractic should be the same as those for medicine. The current Fox Valley phone directory lists the following medical specialties, among others:

obstetrics & gynecology	bariatrics	plastic surgery
internal medicine	allergy	cardiology
cardiac surgery	dermatology	nephrology
vascular and thoracic surgery	endocrinology	family practice
gastroenterology	infectious disease	ophthalmology
otorhinolaryngology	neurology	orthopedics
occupational medicine	pediatrics	physiatry
pulmonary medicine	rheumatology	urology
general surgery	psychiatry	oncology

Within each of the listed specialties there are a plethora of situations each of the specialists might face with numerous treatment options and attendant risks and potential rewards. In regulating medical practice, the legislature and courts of Wisconsin have developed law, largely under Chapter 448, "Medical Practices," and Chapter 655, "Health Care Liability and Patients Compensation," which address the complexities and diversity of medicine. Quite simply, these regulations and the

case law interpreting them do not, and should not, apply to chiropractic.

Chiropractic is governed by Chapter 446, "Chiropractic Examining Board," and the regulations adapted pursuant to that chapter's authority. Practitioners do receive a doctor of chiropractic degree, but they do not practice medicine, nor possess a medical doctor's training, experience, or degree. Section 446.01, *Wis. Stats.*, describes the scope of chiropractic as the treatment of health conditions by employing "chiropractic adjustments and the principles or techniques of chiropractic science... ." While both medical doctors and chiropractors are health care providers in the sense that they are attempting to address human health concerns with their separate and distinct skills and training, that is where any similarity ends. The trial court in this case was confronted with longstanding and well settled law drawing a sharp line between the two fields, superimposed upon which was a new regulation imposing an "informed consent" obligation on chiropractors not yet addressed by the courts.

An historical review of the three principle Wisconsin cases addressing the distinct governance of chiropractic is instructive. The first case, Kuechler v. Volgmann, 180 Wis. 238, 192 N.W. 1015, 31 A.L.R. 826 (1923), arose before there was any requirement in Wisconsin that a chiropractor be certified or licensed. The plaintiff was experiencing "nervousness and headaches," and went to the defendant chiropractor for treatment. The defendant diagnosed the cause to be "some derangement of the stomach," and provided chiropractic treatment for eight

months, during which time the symptoms only seemed to get worse. He then advised the plaintiff to visit the West for a time, apparently to see if the condition was improved by the change of climate. While out West, the symptoms continued to worsen to the point that the plaintiff at times became blind. Finally, the plaintiff returned to Wisconsin, visited medical doctors in Chicago, and was diagnosed with a brain tumor. By the time it was properly diagnosed, the tumor had progressed so far that a portion of the plaintiff's skull had to be removed to alleviate the intracranial pressure. The plaintiff's essential allegation was that if the diagnosis had properly been made when he first presented the symptoms to the chiropractor, surgery then would have "effected an immediate and permanent cure."

The trial court had sustained the defendant's demurrer, essentially dismissing the complaint on the pleadings, on the ground that the complaint failed to allege that the chiropractor did not adhere to the standard of care which "physicians of good standing of the same school or system of practice usually exercise in the same or similar localities under like or similar circumstances... . 192 N.W. at 1017. The question presented on appeal was whether a chiropractor should be held to the same standard of care as a medical doctor.

There, the Court answered affirmatively relying on a statute which allowed unlicensed healers, like chiropractors, to provide care, but subjected them to liability for malpractice just like a physician. The statute further provided, as follows:

> [A]nd ignorance on the part of any such person shall not lessen such liability for failing to perform or for negligently or unskillfully performing or attempting to perform any duty assumed, and which is ordinarily performed by licensed medical or osteopathic physicians, or practitioners of any other form or system of treating the afflicted. 192 N.W. at 1017

The Court held that in the realm of diagnosis, a chiropractor was to be held to the same standard as a medical doctor or osteopath.

By the time the next major case reached the Court, over six decades later, the state had instituted license requirements, statutes, and regulations that governed chiropractic. In Kerkman v. Hintz, 142 Wis.2d 404, 418 N.W.2d 795 (1988), the plaintiff sought chiropractic treatment from the defendant for complaints of soreness in the upper shoulders and neck and numbness in his hands. Over a period of about two weeks, the defendant saw the plaintiff four times and administered three to four adjustments. Several weeks later, the plaintiff was seen medically, was diagnosed with a compressed spinal column and a herniated disc, and ultimately underwent two surgeries. In accord with Kuechler, the plaintiff's testimony and the Court's instruction to the jury related to whether the defendant had exercised the same degree of care and skill which is usually exercised by a recognized school of the medical profession. On appeal, this Court reversed its longstanding rule in light of the very different legal framework which had developed to govern the practice of chiropractic, and held that a chiropractor must be held to a chiropractic, not medical, standard of care. The Court repeatedly drew the distinction between medicine and chiropractic, including when it said the

following:

> [A] chiropractor does not treat or diagnose disease. Instead, a chiropractor's practice is limited to the analysis and correction of subluxation. The chiropractor's function is to locate the subluxation, if it exists, adjust it back to the correct position and then allow the body to restore itself to normalcy. A medical doctor's practice, on the other hand, is completely opposite. The medical doctor is concerned with the diagnosis and treatment of the diseased area through the use of drugs and surgery or other techniques.
>
> 142 Wis.2d at 416, 418 N.W.2d at 800-01.

The Court went so far as to conclude that a chiropractor could not be held liable for failing to refer a patient to a physician for medical treatment because that determination would required medical rather than chiropractic expertise.

Finally, the question again arose, this time before the Court of Appeals, and the case directly presented the court with the question of whether the medical standards and principles governing the doctrine of informed consent should apply to chiropractic. In Murphy v. Nordhagen, 222 Wis.2d 574, 588 N.W.2d 96 (Wis. App., 1998), over a period of about 6 weeks, the plaintiff sought treatment from the defendant chiropractor for low back pain and numbness into her buttocks. She had pain in her buttocks and upper legs that had been getting worse. The defendant provided treatment, and the plaintiff seemed to improve at times, but at other times it was much worse. Finally, she reported more extreme numbness and constipation for three days, and the defendant told her she should see her medical doctor for the constipation. Ultimately, she consulted with a neurologist, an MRI was done and a derranged disc was found. Shortly thereafter a lumbar discectomy

was performed. The trial court granted summary judgment ruling that under Kerkman there was no duty to diagnose the medical condition or refer, and that there was no "informed consent" duty in the context of chiropractic practice. Again, the Court of Appeals affirmed ruling that there was no duty of the chiropractor to refer the patient to a physician, and that the medical standards for informed consent do not apply to chiropractic. Noting that the statute provides that "[a]ny physician who treats a patient shall inform the patient about the availability of all alternate viable medical modes of treatment and about the benefits and risk of these treatments," the court said, "Murphy is in error to the extent she contends either the statute or the cases have any relevance to her lawsuit." 222 Wis.2d at 584, 588 N.W.2d at 100-101.

Subsequent to the factual events giving rise to Murphy, the chiropractic board did issue its informed consent provision. It is totally dissimilar from the statute applying to physicians. This is exactly what the state of the law was when the trial court here was asked by Dr. Boyson to instruct the jury here by simply reading the medical informed consent instruction and giving them the special verdict form which is recommended for medical negligence cases.

II. DR. BOYSON WAS NOT PREJUDICED BY THE TRIAL COURT NOT PROVIDING THE JURY WITH THE SUGGESTED PATTERN SPECIAL VERDICT FORM TO BE USED IN MEDICAL NEGLIGENCE CASES INVOLVING THE ISSUE OF INFORMED CONSENT.

It is fair to say that the evidence concerning Dr. Boyson's failure to obtain Mr. Hannemann's informed consent was overwhelming. Dr. Boyson admitted that he never told Mr. Hannemann of the risk of neurovascular injury associated with cervical, chiropractic adjustments. This was true even as he proceeded to administer an adjustment in the midst of the apparent evolution of Mr. Hannemann's symptoms the weekend of his stroke. Even Dr. Wilder, Dr. Boyson's own witness regarding the chiropractic standard of care, admitted to the jury that if Dr. Boyson proceeded with the Saturday adjustment without warning of the risk as is reflected in the chiropractic records and Mr. Hannemann's testimony, the standard of care would have been breached. Mr. Hannemann absolutely testified that if he had been warned of the possibility of incurring a stroke, he would not have subjected himself to the treatment. To suggest to the contrary would be absurd.

Chiropractic is the practice of employing spinal adjustments to address bodily discomfort or promote general health. All of the disclosure of risk forms from the various chiropractic colleges and Dr. Wilder, gave the potential patient an overview of the risks involved in chiropractic treatment in general terms, including the risk of neurovascular injury including stroke. (R. 60, Murkowski Deposition, p. 23) The jury was instructed, as follows:

> A chiropractor has the duty to provide his patient with information necessary to enable the patient to make an informed

> decision about a procedure and alternative choices of treatments. If the chiropractor fails to perform this duty, he is negligent.
>
> To meet this duty, to meet his duty to inform the patient, the chiropractor must provide his patient with the information a reasonable person in the patient's position would regard as significant when deciding to accept or reject the medical [sic] treatment. In answering this question, you should determine what a reasonable person in the patient's position would want to know in consenting to or rejecting a chiropractic treatment.
>
> However, the chiropractor's duty to inform does not require disclosure of:
>
> Information beyond what a reasonably, well-qualified chiropractor in a similar classification would know; extremely remote possibilities that might falsely or detrimentally alarm the patient;
>
> R. 64, p. 54-55 (as adapted from WIS JI-CIVIL 1023.2)

The jury was then told unambiguously, by employing the standard, well-settled "cause" instruction, that the negligence was actionable only if they found it to be a substantial factor in causing the injury to the plaintiff. The Trial Court's instructions and verdict correctly reflected the applicable law, and the jury's answers were, without any doubt, well supported by the evidence, if not obvious.

The special verdict question requested by Dr. Boyson which is at the heart of the issue before this Court, is the second proposed question found in WIS JI-CIVIL 1023.1, "Professional Negligence: Medical: Informed Consent; Special Verdict," which reads as follows:

> If you answered question 1 "yes," then answer this question: If a reasonable person, place in (patient)'s position, had been provided necessary information about the (insert treatment or procedure), would that person have (refused)(accepted) the (insert treatment or procedure)?
>
> Answer: _____
>
> Yes or No

This is not an improvement on the instructions and verdict form used by the trial court, it is very confusing, and it would not have aided the jury in reaching its verdict. The very heart of any analysis of informed consent is the balancing of risk and reward. One would think that in the case of tremendous reward for little risk (perhaps a smallpox inoculation) a jury's answer to the question would be "yes" for acceptance of the treatment? Likewise, in the case of minor reward for tremendous risk (perhaps an experimental, risky brain surgery to address a minor, annoying twitch) a jury's answer to the question would be "no" for acceptance of treatment. Even under our law concerning medical informed consent, it is where the decision is less obvious that the educated decision of the patient becomes most important. Take the example of a middle aged patient with significant knee pain which he, or she, is advised can only be significantly improved by a total knee replacement, with significant risks and limited years of effectiveness. In the case of this patient, the decision is a much closer call. Some reasonable patients would decide to accept the treatment, yet an equal number of reasonable patients might refuse it. The jury's answer to the special verdict requested by Dr. Boyson know becomes "maybe Yes, and maybe No." That cannot possibly be appropriate.

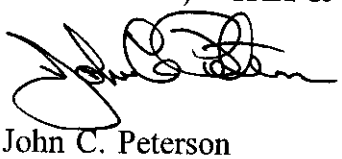
CONCLUSION

At the time the trial court devised the appropriate instructions and verdict form to present to the jury for their deliberations, the controlling Wisconsin law was that the practice of chiropractic was not governed by the statutes, regulations, and law governing the practice of medicine. This was explicitly true regarding the doctrine of informed consent. In light of the recently enacted change in the chiropractic regulations requiring chiropractors to maintain in their patient files "documentation of informed consent," the trial court properly and accurately fashioned an instruction for the jury as to when a chiropractor would be negligent for failing to disclose a material risk to a patient. The jury was then told in what could well be our most well-settled instruction, that the negligence, if found, still had to be an actual, substantial factor causing the plaintiff injury.

The trial court's instruction and verdict accurately reflected Wisconsin law. The verdict form requested by Dr. Boyson did not. Mr. Hannemann respectfully requests that the decision of the Court of Appeals be reversed and the verdict and judgment of the trial court be affirmed.

Respectfully submitted this 22nd day of November, 2004.

PETERSON, BERK & CROSS, S.C.



By: John C. Peterson
State Bar No.: 1010965
Jolene D. Schneider
State Bar No.: 1023881
Attorneys for Plaintiff-Respondent,
Gary Hannemann

200 East College Avenue
P.O. Box 5159
Appleton, WI 54912-5159
(920) 831-0300

CERTIFICATION OF FORM AND LENGTH

I certify that this brief conforms to the rules contained in Sec. 809.19(8)(b) and (c). Wis. Stats., for a brief produced using the following font:

Proportional serif font: Minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points, maximum of 60 character per full line of body text. The length of this brief is 2,474 words.

Dated this 22nd day of November, 2004.

PETERSON, BERK & CROSS, S.C.

By: John C. Peterson
State Bar No.: 1010965
Attorneys for Plaintiff-Respondent

200 East College Avenue
P.O. Box 5159
Appleton, WI 54912-5159
(920) 831-0300

CERTIFICATION OF MAILING

I, Heidi Lucas being first duly sworn on oath, state that I am an employee of Peterson, Berk & Cross, S.C., and not a party of this action; that on the 18th day of October, 2004, in the State of Wisconsin, County of Outagamie, I sent via Federal Express, Reply Brief of Plaintiff-Respondent-Petitioner Gary Hannemann to the Clerk of Court of The Supreme Court of Wisconsin, 110 East Main Street, Suite 215, Madison, Wisconsin 53703.

Heidi Lucas

Subscribed and sworn to before me
this 22nd day of November, 2004.

Notary Public, Outagamie County
My commission is/expires 9/02/07

NOTARY PUBLIC
ERIN S. MOEDE
STATE OF WISCONSIN